

EXHIBIT B-147



IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE 2 MAY 2022 SPECIAL PURPOSE
GRAND JURY

No. 2022-EX-000024

MEDIA INTERVENORS' NOTICE OF FILING

The Atlanta Journal-Constitution; The Associated Press; Bloomberg L.P.; Cable News Network, Inc.; CMG Media Corporation and its television station WSB-TV; Dow Jones & Company, publisher of The Wall Street Journal; The E.W. Scripps Company on behalf of Scripps News and its local media station group; Gray Media Group, Inc. and its television station WANF; The New York Times Company; and Tegna Inc. and its television station WXIA-TV (collectively, “Media Intervenors”), respectfully submit this Notice of Filing.

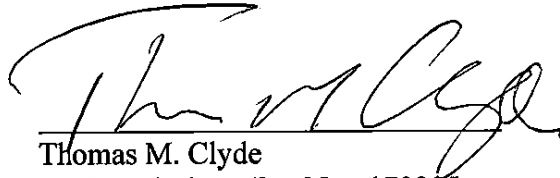
Attached hereto as Exhibit A is a true and correct copy of the transcript of the hearing held by this Court on January 24, 2023.

Attached hereto as Exhibit B is a true and correct copy of the October 22, 2010 Report and Special Presentments of the Special Purpose Grand Jury in the Superior Court of Gwinnett County, as published by the legal organ for Gwinnett County, *The Gwinnett Daily Post* (the “Gwinnett SPGJ Report”). The October 22, 2010 Report was presented to the Court and State during the Court’s January 24, 2023 hearing in this matter.

Dated this the 13th day of April, 2023

Respectfully submitted,

FOR: KILPATRICK TOWNSEND & STOCKTON LLP

A handwritten signature in black ink, appearing to read 'Th M Clyde', is written over a horizontal line.

Thomas M. Clyde

Georgia State Bar No.: 170955

tclyde@kilpatricktownsend.com

Lesli N. Gaither

Georgia State Bar No.: 621501

лгаither@kilpatricktownsend.com

Suite 2800, 1100 Peachtree Street, N.E.

Atlanta, Georgia 30309

Phone: (404) 815-6500

Attorneys for Media Intervenors

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the
above via Electronic and United States Mail upon:

Fani T. Willis
Will Wooten
District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Fani.willisda@fultoncountyga.gov
Will.wooten@fultoncountyga.gov

DATED this the 13th day of April, 2023

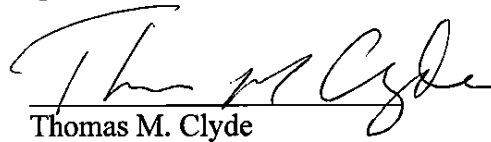

Thomas M. Clyde

EXHIBIT “A”

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE: 2 MAY SPECIAL)
PURPOSE GRAND JURY)
)
) 2022-EX-000024

TRANSCRIPT OF SPECIAL PURPOSE GRAND JURY HEARING
BEFORE THE HONORABLE ROBERT C.I. MCBURNEY
ON JANUARY 24, 2023, ATLANTA, GEORGIA

APPEARANCES:

ON BEHALF OF THE STATE:

*FANI WILLIAMS, ESQ.
ELECTED DISTRICT ATTORNEY

ADA FMCDONALD WAKEFORD, ESQ.

ADA WILL WOOTEN, ESQ.

ADA ADAM NEY, ESQ.

ADA NATHAN WADE, ESQ.

ON BEHALF OF THE MEDIA INTERVENORS':

THOMAS M. CLYDE, ESQ.

LESLI GAITHER, ESQ.

KAREN RIVERS, RMR, RPR, CCR-2575
OFFICIAL COURT REPORTER
FULTON COUNTY JUSTICE CENTER TOWER
185 CENTRAL AVENUE, S.W.
ATLANTA, GEORGIA 30303

1 THE COURT: So, Mr. Ney, if I could have
2 the appearance for the State.

3 MR. NEY: Adam Ney, your Honor.

4 THE COURT: And on behalf of the media
5 interveners?

6 MR. CLYDE: Your Honor, Tom Clyde and
7 Lesli Gaither.

8 THE COURT: Welcome both of you.

9 Mr. Clyde, will you be doing the primary
10 speaking for the Media Intervenors'. I'm happy to
11 have it spread out wherever, but if I have
12 questions for your side, should I just pose them
13 and you guys will flip a coin?

14 MR. CLYDE: I welcome just posing them,
15 and we'll flip a coin, but I anticipate I will be
16 doing the bulk of the argument.

17 THE COURT: Great. Mr. Ney just breathed
18 a side of relief.

19 Mr. Wade, who will be answering questions
20 if I've got any for the District Attorney's Office.

21 MR. WADE: So, Judge, here for the State
22 is myself, Nathan Wade. Donald Wakeford is here as
23 well as well as Adam Ney and Will Wooten. Madam
24 District Attorney will be making an appearance as
25 well, Judge. But, for the bulk of the argument we

1 anticipate it will be Donald Wakeford.

2 THE COURT: Great. Well, welcome all of
3 you.

4 So, we're here to discuss whether the
5 final report that the special purpose grand jury
6 that was created, if you will, by Chief Judge
7 Brasher's order from January 24th of last year and
8 that was empaneled in May of last year. Whether
9 their final report should be made public, in part,
10 in whole or if it should remain where it is, which
11 right now is solely in the District Attorney's
12 custody. So everyone is clear, I hand delivered to
13 the District Attorney the copy of the final report
14 soon after it was available, and my colleagues have
15 voted that the special purpose grand jury had
16 completed its work and should be dissolved., And
17 that's the one copy I'm aware of that is in
18 circulation within the District Attorney's span of
19 control. But the question has come up as to
20 whether it should be shared more broadly. The
21 special purpose grand jury voted pursuant to
22 O.C.G.A. 15-12-80 to have the report made public.
23 We need to work through the consequences, if any,
24 of that vote. We need to talk about whether this
25 final report is the equivalent of a general

1 presentment, if those terms really even make a
2 difference, and we need to talk a little bit about
3 how the final report might be viewed as what the
4 courts have referred to as court records, which
5 enjoy a presumption of public access, or if this
6 final report is somehow something different. And
7 I'll note going in that there are precious and few
8 cases in Georgia dealing with special purpose grand
9 jury's because they are few and far between. But
10 there are some, and they provide some guidance as
11 to what can happen with a final report from a
12 special purpose grand jury. I think there is
13 precedent for their final reports being disclosed.
14 I'm holding one in my hand. It was one of the
15 exhibits to the media intervenors' brief, so it's
16 been done before. That doesn't mean that that was
17 the right thing to do. It also doesn't mean that
18 that special purpose grand jury was sufficiently
19 similar to this one. That this one's report ought
20 to be treated the same way. I just want to be
21 thoughtful about it because there's clearly great
22 interest in the work that the special purpose grand
23 jury completed, and we need to be responsive to
24 what may be competing concerns of the investigative
25 interests of the District Attorney's Office and the

1 public's interest in understanding what its
2 colleagues, the members of the special purpose
3 grand jury did after they heard the evidence that
4 was presented to them.

5 So, Mr. Wakeford, I'm happy, if there's
6 something you want to say up front, but otherwise,
7 I've got questions that I'd love to get a DA's
8 Office prospective on to help me frame this, and
9 then I have similarly for Mr. Clyde and Ms. Gaither
10 some questions.

11 MS. WILLIS: May I address the Court?

12 THE COURT: You may.

13 MS. WILLIS: Fani Willis, the Elected
14 District Attorney for Fulton County, on behalf of
15 the citizens and the state.

16 I believe that Mr. Wakeford will give you
17 some of the answers that you have required. But
18 just as an overview -- first of all, the thought
19 that this is a presentment grand jury, you and I
20 both know it's really kind of a nonsensical
21 question.

22 THE COURT: So, be thoughtful as you work
23 through this. Because don't lump me with you as to
24 who thinks what is nonsensical and what's not. So
25 you tell me what you think, and then I will let you

1 know later on what I think.

2 MS. WILLIS: Fair enough.

3 THE COURT: Excellent.

4 MS. WILLIS: Back in May of last year,
5 the Honorable Chief Brasher swore in 26 members of
6 the public to create a special purpose grand jury.
7 Their entire function was to be an investigative
8 tool. And we are very very thankful to those
9 citizens. As you and I both know, they gave up a
10 great deal of their time. Hopefully, you and I can
11 agree on that.

12 THE COURT: We do.

13 MS. WILLIS: And heard from 75 witnesses,
14 saw countless exhibits, but all for the purpose of
15 investigation. At this point, reaching back to
16 prior experience of both myself and I'm going to
17 say you again, because I know your history is that
18 you've been a prosecutor. Often when a prosecutor
19 is in a trial courtroom they find themselves in
20 this position of not only protecting the rights of
21 the victims, witness and the community, but making
22 sure that Defendant's rights are protected, too.
23 Rights sometimes is a very selfish interest; you
24 don't want the case overturned. And so as the
25 prosecutor we stand in that position of protecting

1 everyone in the courtroom's rights. Having been
2 one of very few people that have had the
3 opportunity to read that report, you being the
4 other one, I think we can assume that fact is also
5 true. In this case, the State's understands the
6 media inquiry and the world interests. But we have
7 to be mindful of protecting future defendant's
8 rights. And so what the State does not want to see
9 happen, and don't think that there's anyway the
10 Court would be able to guarantee, is that if that
11 report was released there somehow could be
12 arguments made that it impacts the right for later
13 individuals, (multiple) to get a fair trial, to
14 have a fair hearing, to be able to be tried in this
15 jurisdiction. The list can go on and on. And so
16 representing the state of Georgia and these
17 citizens, I know we have this common interest, we
18 want to make sure everyone is treated fairly, and
19 we think for future defendants to be treated fairly
20 it's not appropriate at this time to have this
21 report released. I, as the elected District
22 Attorney, have made several commitments to the
23 public understanding, the public interest around
24 this case. The first was before you were assigned
25 to this case. I said by June of that year I would

1 make a decision as to whether we would ask for a
2 special purpose grand jury. In fact, I did so in
3 May, which is why they were ruled on in May. I
4 then asked for a special purpose grand jury to last
5 for a year, but made certain commitments by the end
6 of such year, meaning last year 2022, the special
7 purpose Grand Jury's work would end. At this time,
8 in the interest of justice and the rights of not
9 the state but others, we are asking that the report
10 not be released. Because you haven't seen that
11 report, decisions are imminent.

12 THE COURT: All right. Thank you. And I
13 didn't mean to skip over you DA Willis. Mr. Wade
14 had mentioned that you would be appearing at some
15 point, but that Mr. Wakeford would be primary
16 spokesperson. So, I wasn't sure if the way in
17 which you all were going to present, but thank you
18 for sharing those overview comments.

19 Mr. Wakeford?

20 MR. WAKEFORD: Good morning, Judge.

21 THE COURT: Or afternoon. How are you
22 doing?

23 MR. WAKEFORD: I'm just fine, Judge.

24 THE COURT: Good.

25 MR. WAKEFORD: So I understand, your Honor

1 -- I have a question for your Honor first, and then
2 I understand that your Honor has questions for me.
3 If you'll indulge me?

4 THE COURT: I will. Maybe.

5 MR. WAKEFORD: Sure. That's your
6 prerogative, Judge.

7 Your order actually calling for this
8 hearing made mention of a certification from the
9 grand jury that they asked that their report be
10 published under O.C.G.A. 15-12-80. To my knowledge
11 standing here, I also -- I don't want to make
12 comments about the contents of a report whose
13 confidentiality is the subject of this hearing.

14 THE COURT: Sure.

15 MR. WAKEFORD: But I'm prepared to say
16 that a mention of 15-12-80 is not in the report.

17 THE COURT: Sure.

18 MR. WAKEFORD: So I'm asking your Honor
19 what the source of the certification mentioned in
20 your order is.

21 THE COURT: The grand jurors. So, it's
22 not -- you're correct, it's not in the report. It
23 is something that they did after they completed
24 their work.

25 MR. WAKEFORD: Okay. All right. Thank

1 you, your Honor. That was not one thing I was not
2 able to ascertain.

3 THE COURT: Sure. You didn't miss
4 anything nor was I reading between the lines or
5 there's a footnote that was omitted.

6 MR. WAKEFORD: Okay. And I understand
7 your Honor has questions for me. I'm fully
8 prepared to engage in a dialogue if that's the way
9 you would prefer to proceed.

10 THE COURT: Well, let me ask some
11 threshold questions because that may help focus the
12 dialogue and also focus the dialogue with Mr. Clyde
13 and Ms. Gaither. I'm trying to understand the
14 basis for the request for nondisclosure, and I'm
15 approaching it from a number of angles. One is the
16 fairly limited scope of secrecy of grand jury work
17 in Georgia, and with that I'm particularly
18 influenced by the Olsen case where the Supreme
19 Court made plain that their view of the statutory
20 framework for grand jury's is that really only
21 deliberations are secret. Secret isn't the only
22 touchstone here, but that's what's in the oath, is
23 that deliberations are kept secret. You, had you
24 been present for anything that happened in front of
25 the grand jury are not bound by any statute or oath

1 to maintain secrecy about anything that happened.
2 None of the witnesses who appeared are bound by any
3 oath. Their oath is simply to provide truthful
4 testimony. Not to then not disclose their
5 testimony to the media, their uncle or anything
6 like that. And grand jurors are bound by their
7 oath only not to discuss deliberations. So unless
8 we -- and I believe it's a stretch. Unless we
9 somehow stretch to say their final report is their
10 deliberations then, I think, we're already outside
11 the statutory realm of what's secret. That doesn't
12 mean something should be disclosed just because
13 it's not secret as part of the grand jury. But
14 going into this my thinking was everything with the
15 grand jury is secret and there had to be an
16 exception. And in Georgia it seems like it's
17 almost the reverse. It's very different from
18 federal grand jury. And I know I asked you to
19 share some thoughts about how we're going to work
20 with the special grand jurors going forward. And
21 there are lessons to be drawn from federal practice
22 but are not driving our decisions. So talk me
23 through just first this question of secrecy and why
24 if that's one of the arguments you think that -- it
25 really doesn't matter what you want to do, Judge,

1 it's secret statutorily the final report. And then
2 we'll evolve to a court record or not or this
3 notion that in someways may be nonsensical that a
4 final report is equivalent to a presentment of the
5 special purpose grand jury.

6 MR. WAKEFORD: Okay. Yes, your Honor.
7 And let me say also, if there are questions -- I
8 would ask your Honor if there are questions at the
9 end of the hearing today that I feel that I can
10 request us to provide a written response or more
11 research on, I would simply ask for the opportunity
12 to do that.

13 THE COURT: Sure.

14 MR. WAKEFORD: So, in other words, that
15 the report is not -- a decision is not rendered and
16 the report is not released at 12:59 pm on today.

17 THE COURT: That's not how it will
18 happen. They'll be notice in case there's decisions
19 that want to be made after you understand what the
20 decision is.

21 MR. WAKEFORD: Understood. I also will
22 -- sorry for all the prefaces. I have to be a
23 little bit circumspect because I have to talk about
24 this report while attempting not to divulge the
25 contents of the report.

1 THE COURT: And I intend to do the same.
2 So none of my questions will be about -- well, what
3 about page six, if there's even a page six, if the
4 pages are numbered. That's not -- I promise I won't
5 be trying to drag you into -- oh, but wait this
6 part here or tell me what part you think ought to
7 be redacted. That assumes that I would have
8 decided some part ought to be made public. I
9 haven't. We can keep it at the very high level, and
10 in why is it a secret.

11 MR. WAKEFORD: I'm glad to here that your
12 Honor. I just didn't want to try your patience if
13 I keep talking about the report could be rather
14 than what the report is. But, I'm glad you
15 understand the position that we're in.

16 THE COURT: And I think it helps Mr.
17 Clyde and Ms. Gaither are necessarily going to have
18 to approach it that way. They don't know what
19 color paper it was printed on. Is it double
20 spaced, and what's in it. By you and me having
21 exchanges at that level as well will make it easier
22 for the different prospective's to share their
23 views.

24 MR. WAKEFORD: Right. Okay. So, then
25 the question of secrecy, your Honor -- I would say

1 that the special purpose grand jury's report in
2 these circumstances -- well, actually in all
3 circumstances. Special grand jury's are special.
4 We have learned that over the course of the past
5 year. As your Honor referred to at the outset of
6 this hearing, there is precious little litigation
7 on this topic.

8 THE COURT: They are special. I'm going
9 to pause you from time to time because If I don't
10 write my question down I need to ask it. There are
11 only two statutes about special purpose grand jury.
12 And one of them says, use all the other statutes
13 about grand jury's unless they somehow conflict. I
14 don't know how they conflict because there's so
15 little in 101 and 102. So, there are many things
16 we know because we look at all the statutory
17 framework for regular grand jury's. Same oath.
18 And that oath says your deliberations are secret.
19 Your oath wasn't different, if you took one. It
20 doesn't bind you in anyway. The witness's take the
21 same oath and they're not bound in any way by any
22 sense of secrecy. Yes, special purpose grand
23 jury's are different. They last longer. They
24 investigate in a different way. They cannot hand
25 down a bill of indictment or anything like that.

1 But, in lots of ways their grand jury's. And so I
2 think that needs to guide our discussion. And a
3 regular grand jury per Olsen this is the pretty
4 narrow parameters of what's secret. Their
5 deliberations. You can't be in there for them.
6 Grand jurors can't discuss their deliberations.
7 But when they're done, here's our indictment, our
8 presentment, whatever it may be. And so I'm
9 analogizing, perhaps, mistakenly, and you can help
10 me work through that. When we slide over here it's
11 a special purpose grand jury. Those grand jurors
12 ought not talk about their deliberation, but when
13 we're done what pops out of the toaster. Instead
14 of an indictment is a final report. I don't see
15 how that's secret based on the statutory framework
16 in which we're working. Again, not dispositive.
17 But, you may be able to convince me it is secret
18 because of this case or that case. I know you
19 don't have a case, you would have sent it to me
20 long before, but I'm interested in your analysis.

21 MR. WAKEFORD: Thank you, Judge. I guess,
22 let's start up here then. And the first point to
23 be made is that special purpose grand jury's can be
24 empaneled at the explicit request of the District
25 Attorney, the prosecutor, which is, in fact, what

1 happened in this case. It was empaneled with the
2 request that they investigate certain matters and
3 also be in power to provide charging
4 recommendations, if any, to the District Attorney'
5 who would then not be bound by those
6 recommendations but could be advised by them moving
7 forward.

8 THE COURT: Right. The special purpose
9 grand jury whose report is Exhibit C of the media
10 intervenors' filing, which was Dekalb, presided
11 over by Judge Scott, do you know -- I don't, that's
12 why I'm asking. Was that special purpose grand
13 Jury convened at the request of Robert James, who
14 would be Ms. Willis's counterpart at that time in
15 Dekalb County.

16 MR. WAKEFORD: I actually do not know the
17 answer to that question.

18 THE COURT: That would be an interesting
19 question to answer.

20 MR. WAKEFORD: But I will endeavor to find
21 out, of course.

22 THE COURT: Me, too.

23 MR. WAKEFORD: But in this case
24 specifically, I think the specialness of special
25 purpose grand jury's in someways point to how

1 individual they are. So, in that case that's a
2 fine example. The ambit of the authority for the
3 special purpose grand jury in that case was to look
4 into a civil investigation. That is not what this
5 case is about. This case, as we have litigated it
6 constantly, and as your Honor had purpose to look
7 into constantly, has been a criminal investigation
8 at the request of the District Attorney. And the
9 report --

10 THE COURT: I'm going to pause you for a
11 second. Page six, pursuant to the relevant
12 statutes. On September 7, 2011, the District
13 Attorney -- so Robert James -- requested that a
14 special purpose grand jury be empaneled. Dekalb
15 Stone Mountain Judicial Circuit voted to approve.
16 Entered an order, and thus, was created that
17 special purpose grand jury. So structurally, it's
18 the same or similar. DA James said, I need a
19 special purpose grand jury to investigate
20 something. And as a result of their investigation
21 there was a report and it was published.

22 MR. WAKEFORD: Yes, your Honor. What I'm
23 saying is then in this case it was requested by the
24 District Attorney for the sole purpose of
25 conducting an investigation into possible criminal

1 activity. And that the report, therefore, could
2 consist of several different types of information.
3 There could be a summary of what the grand jury
4 came to find out in the course of its
5 investigation. There could be a list of statutes
6 that the grand jury thinks might have been violated
7 by someone. There could be a list of individuals
8 with accompanying activities that the grand jury
9 believes could be-- could have broken the law. It
10 could even get more detailed than that. And so the
11 actual content of the report I think gives us some
12 guidance here as to how secret to perceive-- how
13 much respect to provide the secrecy of this report.
14 Because as your Honor knows ongoing criminal
15 investigations having different --a different
16 understanding as far as court records are concerned
17 in this case. And in fact, records that are part
18 of an ongoing investigation are not subject to
19 public scrutiny. When the District Attorney
20 requested that the special purpose grand jury
21 engage in this investigation and provide
22 recommendations if they saw fit, it was as part of
23 -- at that time and at this time ongoing criminal
24 investigation. If that report contains information
25 it is for the use of the District Attorney per the

1 empaneling order. If that report contains charging
2 recommendations that is certainly solely for the
3 use of the District Attorney, and I would argue
4 that under the law what the law tells us under
5 15-12-101, I believe, is that the only required
6 recipient of the special purpose grand jury's final
7 report is you as the supervising judge except in
8 this case where it was also the district attorney.
9 Because if -- whether there are recommendations or
10 not the District Attorney has to ascertain that.
11 So has to see the report. So I think that's a
12 lesson right there, in that the content of the
13 report and the nature of the empaneling order in a
14 specific special purpose grand jury can affect how
15 we view it under the law. And of course, I will
16 speak to court records and presentment versus
17 reports in greater detail. But I think that is an
18 indication of what we are operating under with
19 regard to the statutory language. The content of
20 the report should be the guide for this court as to
21 exercising its discretion and how to move forward
22 with respect to secrecy and publication.

23 THE COURT: But what -- I follow. But
24 what about the process makes it secret? I'm trying
25 to understand. We need to be guided by the

1 statutes that are not there for optional
2 consideration and the deliberations are secret.
3 Are you saying this is deliberations or you're
4 saying you know what, judge, let's table the whole
5 secrecy thing. Because I don't think you can
6 stretch the statutes to say the report is secret,
7 but maybe this is where you want to go next. The
8 report is not a court record, so we don't get to
9 Uniform Superior Court Rule 21 analysis.

10 MR. WAKEFORD: That's exactly where I
11 would head next.

12 THE COURT: Okay. Let's go there.

13 MR. WAKEFORD: I would flip the question.
14 I would say in what respects is it secret is one
15 way in looking at it. And certainly, I'm sure that
16 my colleagues from the intervenors' would look at
17 it from that prospective. I think I have looked at
18 this question as what makes it subject to
19 publication. And there's nothing in 15-12-100 or
20 101 that indicates that there is any contemplation
21 of publication. Any special contemplation of
22 publication. And I know where your Honor's going.
23 Because 15-12-102 says that part one of the grand
24 jury code sections applies unless otherwise
25 indicated. But 15-12-80 which is with regard to

1 publication applies only to general presentments.
2 And again, the content of a special purpose grand
3 jury report can contain elements of both a general
4 and a special presentment. Making it a third kind
5 of thing. A special purpose grand jury report it's
6 an isolated instance under the law.

7 THE COURT: But I want to --I think we
8 may be able to dispose of one term so we don't get
9 too confused. My understanding is that this concept
10 of special presentment has gone away. That
11 basically indictments and special presentments, one
12 in the same. We don't do special presentments
13 anymore. A grand jury can indict someone if they
14 are presented --first, if it's not a special
15 purpose grand jury. But in reviewing case law that
16 you've provided and that I'd received from the
17 media intervenors', I got the sense that we really
18 don't even use that term "special presentment"
19 anymore. You're welcome to. I don't know that--I
20 think it's going to cloud things a little bit. I
21 think in one corner you've got charging documents
22 which this body had no authority to present. And
23 we have a history. There's at least one Supreme
24 Court case dealing with a rogue special purpose
25 grand jury that this said not only do we think you

1 should do this DA, but we've indicted him for you.
2 Thank you. That's a step you can't take. That's
3 the District Attorney's decision to make and then
4 ultimately a regular grand jury hearing the
5 evidence deciding whether there ought to be a true
6 bill.

7 MR. WAKEFORD: That was an court of
8 appeals decision.

9 THE COURT: Court of appeals. Either
10 way, it was out of Gwinnett County. That is not
11 what we're dealing with here. So I don't know that
12 we get into special presentment. Why is the final
13 report so distinct that it ought not to be treated
14 as a general presentment, and 15-12-80 ought to be
15 so narrowly read that it's only a general
16 presentment, whatever the heck a general
17 presentment is.

18 MR. WAKEFORD: That's sort of the problem
19 right there, your Honor. Is that -- first of all,
20 special presentments just to put that to bed, I
21 think the distinction is not only that they are
22 charging, but they make specific allegations of
23 wrong doing under the law. So there is a
24 possibility that the report can contain what is
25 essentially a special presentment within it because

1 they were empowered to do precisely that. So I'm
2 coming back to this thing again. The content of
3 the report should guide their analysis. The
4 special purpose grand jury was authorized to return
5 a report that was in all but name took the form
6 after of a special presentment. That's something
7 they had been authorized to do. They were also
8 authorized -- I mean, it just says report. They
9 could have come back and just provided a summary of
10 what they heard everyday. Or they could have
11 provided a two page summary of what overall they
12 thought the picture -- the picture painted for them
13 was. That they are authorized to do any number of
14 these things. And the report can take any of those
15 forms. So a special purpose grand jury report as
16 we'll see can take the form of something akin to a
17 special presentment or to a general presentment or
18 have elements of either. And where 15-12-80
19 specifically says general presentments I don't
20 think that we can say it applies without question
21 to a report issued by a special purpose grand jury.
22 Additionally, I would point your Honor to 15-12-71.
23 That is the duties of the grand jury statute.
24 There's something interesting within this statute
25 in a couple of instances. It was actually pointed

1 out by the intervenors' in their submission to the
2 court. Which is that 15-12-80 is specifically
3 mentioned in 15-12-71 with regards to presentments.
4 What's interesting is that when it appears the
5 legislature has taken pains to point out that a
6 report or presentment provided as a result of a
7 civil investigation conducted by a regular grand
8 jury is subject to 15-12-80 also. They also later
9 say a decision by a grand jury not to pursue
10 charges or recommend charges against a peace
11 officer who has been accused of an unlawful use of
12 force is also subject to 15-12-80. That report or
13 presentment is. If they recommend that charges are
14 pursued, they can recommend it by either requesting
15 an indictment or special presentment. So, in these
16 other places the legislature has not assumed that
17 15-12-80 applies to any report that a grand jury is
18 empowered to produce. When they have to produce
19 these two reports as they are required to under the
20 law they have taken pains to say, oh, and 15-12-80
21 applies, and that is within part one of the grand
22 jury code sections. Part two, which says that
23 unless contradicted everything in part one applies.
24 There's just no mention of 15-12-80 in the special
25 purpose grand jury statutes.

1 THE COURT: There's not. They don't
2 mention any other statute from that first part.
3 They simply say all of the first part is
4 incorporated insofar as it's not specifically in
5 conflict.

6 MR. WAKEFORD: And the other term --Well,
7 it's specifically in conflict, I would say the term
8 they use is report, it is not general presentment.
9 Now, I understand the position of the intervenors'.
10 We're not closing our eyes to their position that
11 come on, there's no distinction between a report
12 and a general presentment. I would refer you,
13 though, to where I began, which is that in this
14 situation the law has created a situation where
15 special purpose grand jury can return something
16 that is either special presentment, a general
17 presentment or has elements of both. And so it
18 just cannot be considered to not be in conflict
19 with 15-12-80, which says general only.

20 THE COURT: If it has elements of both
21 then are the general presentment elements
22 publishable at the special purpose grand jury's
23 direction but not the special presentment parts. I
24 want to move away from labels. They called that a
25 report. They could have written on there general

1 presentment. I think you would still be arguing
2 what you're arguing. Even though they called it
3 general presentment, and thus literally under
4 15-12-80, the Court shall publish other than ultra
5 vires stuff that I am empowered to take out. They
6 called it a final report. I told them to call it a
7 final report. You asked for a final report so
8 that's why it says final report. But what if there
9 are -- as you said, it can contain components of
10 both if there are things that call out at you as
11 general presentment then what do we do with
12 15-12-80?

13 MR. WAKEFORD: Right. And at that point
14 if it's not something that could be considered
15 solely a general presentment then it's not a
16 general presentment under the law.

17 THE COURT: A hybrid presentment?

18 MR. WAKEFORD: Hybrid --it's a special
19 purpose grand jury report. We have a special
20 purpose grand jury statute that makes a special
21 grand jury that produces a report. These are
22 isolated under the law and therefore fall outside
23 of the general understanding in certain instances.
24 One thing that's also not in 15-12-100 or 101 is
25 that a special purpose grand jury cannot indict.

1 So 15-12-102 says all the rest of the first part
2 applies. That doesn't say they can indict. So the
3 court of appeals in its wisdom has decided well
4 that means they can't indict. So just because
5 these two statutes are brief and you have the catch
6 all statute does not mean we are incorporating a
7 single component of part 1 unless there is
8 something glaringly obvious. It actually takes a
9 little bit of -- a lot of analysis to look into
10 this. And I think were the choice of words is
11 report and where the report can take on this sort
12 of strange hybrid form that you cannot assume that
13 the general presentment as used in 15-12-80 applies
14 to a special purpose grand jury report. I think
15 the content of that report again is going to guide
16 this court's analysis as to how really to look at
17 that. And that ultimately if there is something
18 that isn't clearly a general presentment 15-12-80 I
19 cannot apply.

20 THE COURT: Okay.

21 MR. WAKEFORD: I also think that we can
22 reach to the conclusion there is a discretionary
23 aspect here, and that is something Madam DA was
24 actually speaking to. If there are recommendations
25 the District Attorney requested those. And if

1 there are any in there or if there are not any in
2 there the District Attorney in its ongoing
3 investigation has to assess what has been provided
4 by the special purpose grand jury. This report was
5 issued 10 days ago. I'm not even --

6 THE COURT: I don't remember when we had
7 our hand off, but it's recent.

8 MR. WAKEFORD: It's extremely recent.
9 There has been no opportunity whatsoever for this
10 office to incorporate anything in the document into
11 an ongoing investigation in a meaningful way, and
12 to make the ultimate decision that only the
13 District Attorney is empowered to make, which is
14 either there will be -- the investigation's over
15 and no charges will be pursued or the investigation
16 is over and charges will be pursued. And where the
17 express purpose of the report is to investigate a
18 set of circumstances and provide or not provide
19 recommendations to the District Attorney, we think
20 immediately releasing before the District Attorney
21 has even had an opportunity to address publicly
22 whether there will be charges or not, because there
23 has not been a meaningful enough amount of time to
24 assess it, is dangerous. It's dangerous to the
25 people who may or may not be named in the report

1 for various reasons. It's also a disservice to the
2 witnesses who came to the grand jury and spoke the
3 truth to the grand jury.

4 THE COURT: So, how do -- how does one
5 reconcile this prospective with the parallel highly
6 public proceedings with the January 6th commission?
7 Many of the same witnesses hopefully saying similar
8 things if they were asked the same question, but
9 that's not my business, and the commission actually
10 referring to the Department of Justice, you need to
11 look at these people for these things. Dangerous.
12 Pressure on the Department of Justice. They seem
13 to withstand that, and they're doing what they're
14 doing. Maybe they'll bring charges, maybe they
15 won't. Those were recommendations. I think they
16 were called referrals. But clearly congress, one
17 branch, doesn't tell the executive DOJ, another
18 branch, what to do. But there was nothing
19 clandestine, secret, tucked into a report that the
20 public didn't get to see about that process. And
21 that's different. That was not a special purpose
22 grand jury. But that is another situation that has
23 been ongoing that I think I need to assess and
24 reconcile with how it's happening here. Our
25 legislature didn't choose to have hearings like

1 that, and so the way the District Attorney explored
2 it was through the one means she had, a special
3 purpose grand jury. Parts of it secret. Some of
4 it, maybe not. But this danger and impact balance
5 it against the fact that the January 6th commission
6 seem to do what it did and DOJ didn't have to shut
7 down after those referrals came.

8 MR. WAKEFORD: Well, first of all they
9 were looking at issues in a different light than
10 the special purpose grand jury was asked to look at
11 them. Obviously, Congress addresses the entire
12 nation. Special purpose grand jury is focusing on
13 Georgia and possible criminal activity within the
14 state of Georgia or the touches upon the state of
15 Georgia. Additionally, Congress doesn't have to
16 contend with 15-12-101 and 102. I'm not making
17 fun. We are traveling under the law here. So
18 Congress -- if there's danger created because they
19 are not bound similarly by concerns of grand jury
20 secrecy or traditional secrecy here or the -- I'll
21 put it this way. Congress was going to conduct
22 this investigation because Congress can conduct
23 investigations. That's something it is empowered
24 to do. It was not conducting an investigation at
25 the request of the Department of Justice to provide

1 recommendations which would inform it's ongoing
2 investigation. That's what happened here. So to
3 --

4 THE COURT: But I guess the point I'm
5 making through that observation is --it's 21. I
6 don't know that you pointed to any law that says
7 the final report must not be disclosed. Reasons
8 for it. Policy reasons. But it may not, must not,
9 I don't think that's what statute or case law says.
10 So I think it's going to be a balancing -- and I
11 don't mean the balancing of Rule 21. We may get
12 there. I'm not saying that's where we are. But I
13 see nothing that says thou shalt not disclose. And
14 so many some of the very powerful policy arguments
15 that I've been hearing from you and from the
16 District Attorney we need to be thoughtful about
17 lots of stakeholders. And you and I both heard the
18 District Attorney whisper "dangerous," and then you
19 said "dangerous." And I was merely observing a
20 parallel process occurred in Washington DC and the
21 world kept spinning and referrals were made and DOJ
22 processed that and they're going to do what they're
23 doing. And clearly they didn't feel like, well, we
24 better do something right now because very publicly
25 the January 6th Commission referred certain charges

1 against certain people. So, if an argument you're
2 making, the District Attorney's Office is making
3 whomever the person is. But that your office is
4 making is look it may be post indictment. It makes
5 all the sense in the world to disclose the report.
6 But before then you're hamstringing an
7 investigation. Maybe putting inordinate pressure
8 on someone. I get these things, but that doesn't
9 seem to have caused the wheels to fall off the DOJ
10 bus.

11 MR. WAKEFORD: Well, we don't know, your
12 Honor. We don't know because the DOJ operates in
13 such complete secrecy and their grand jury
14 proceedings are subject to much more powerful
15 secretive requirements. So we don't quite know the
16 answer to that question. Additionally, Congress's
17 proceedings happened in public. They were
18 nationally televised. They had witnesses come and
19 testify to the entire nation. And then so when
20 they made recommendations it was based on
21 information that they were publicly releasing.
22 Sometimes live and in living color.

23 THE COURT: Understood. But if Fred
24 Jones was testifying up there and Fred Jones came
25 down here --I mean, that's the only point I'm

1 making. Is that some of this -- well, we don't
2 know what happened in the grand jury insofar as
3 there's overlap. Maybe people do and things -- we
4 don't need to get into that. You've shared with me
5 your prospective on how-- I understand it. How
6 January 6th Commission was different and the fact
7 that they very publicly referred certain charges
8 against certain people to the Department of Justice
9 is sufficiently different that you don't think that
10 there should be a parallel drawn with the concerns
11 here.

12 MR. WAKEFORD: I would also add, your
13 Honor, that while by the necessity of the laws
14 governing serving subpoenas in different states
15 some of the witnesses have been made public. But
16 the public does not know who the witnesses were for
17 the special purpose grand jury.

18 THE COURT: That wasn't my point. I
19 agree. That wasn't my point at all. We heard 75.
20 We heard a number but not names. I was merely
21 observing that the public actually does know a fair
22 number, and some of those names overlapped with the
23 very public presentations to or refusal to share
24 thoughts and ideas and testimony with the January
25 6th Commission. We can move pass that.

1 Talk to me about court record and Rule
2 21. Why is this not -- you may have already
3 answered it because you were analogizing it, I
4 think, aptly to it's an investigative report. And
5 if a detective wrote a final report saying I
6 recommend this person be prosecuted for this
7 homicide, that is not something that the public has
8 traditionally enjoyed right of access unless and
9 until it's part of discovery or it's introduced as
10 an exhibit at trial.

11 MR. WAKEFORD: I think that is exactly
12 how to conceptualize the report at this time, your
13 Honor. I also want to highlight a point that you
14 sort of alluded to a couple of minutes ago, which
15 is that the time for this conversation really
16 should be after the District Attorney -- what to do
17 with the report. What is the nature of the public
18 or secret nature of the report should come after
19 the District Attorney has had an opportunity to
20 state I am not pursuing charges or I am pursuing
21 charges or even I have sought charges and here is
22 the indictment that has been true billed. At that
23 point, the relative stance, the status of everyone
24 involved will be much clearer, and we will have a
25 much better road map for how to handle secrecy or

1 publication. So, I actually think that this entire
2 conversation would be better handled after that
3 decision is made, which the District Attorney began
4 by stating that when she has made assurances as to
5 time frame she has held up or exceeded those
6 assurances. But I will also want to point to
7 another thing. The statute regarding court records
8 is very specific in that ongoing criminal
9 investigations are not subject to public scrutiny.
10 There is no presumption of public access to those.
11 This we think commonsensically falls within those.

12 THE COURT: When you say the statute,
13 you're not referring to Rule 21?

14 MR. WAKEFORD: I mean, Rule 21. In re:
15 Gwinnett County Grand Jury, which is cited, I
16 believe, by intervenors' in their submission
17 actually clarifies that with regard to the kinds of
18 civil investigations which regular grand jury's are
19 empowered to pursue, and which they can produce
20 reports or presentments as a result of, in which
21 the statute says specifically 15-12-80 applies to.
22 They say that the term court records as used in
23 USCR 21 encompasses only the presentments made by
24 the grand jury in open court at the conclusions of
25 the grand jury's investigation. There is a

1 longstanding requirement for which documents must
2 be presented in open court, including special
3 presentments and indictments. Here, the report
4 under 15-12-71 had to be presented in open court
5 and actually already had been. That is not a
6 requirement under 15-12-100 or 101. The only
7 requirement for the final report is that it go to
8 you as the supervising judge, and then in this case
9 go to the jury District Attorney as recipient of
10 either a recommendation for charges or no
11 recommendation for charges. So, there is no open
12 court requirement for special purpose grand jury
13 reports. It's just not there. And the Gwinnett
14 County case points to the fact that the
15 presentments-- it's not that they're presentments,
16 it's that they're made in open court that makes
17 them a court record. You couple that with the
18 presumption that documents attached to an ongoing
19 criminal investigation are not subject to a
20 presumption of public scrutiny or access. And I
21 think it's clear that the report in this case is
22 not a court record as contemplated by Rule 21. I
23 think it's another indication that discretion and
24 the wise choice at this time is -- cannot be that
25 it's released at this time. And everything about

1 the nature of this report indicates that it is
2 premature to make the report public at this time.
3 That I think is the strongest stance I will take
4 before your Honor today.

5 THE COURT: Okay. Let me throw a little
6 bit of a wrinkle at you. What would prevent a
7 special purpose grand juror from reaching out to
8 the media saying I'll tell you what's in the report
9 other than me telling them? But what would be the
10 basis for me telling them because it's not
11 deliberation. So we can step back from
12 presentments and Rule 21 and all these things.
13 It's not deliberations. Maybe it's investigative.
14 It is investigative. Maybe it's disclosable, maybe
15 it's not. Maybe it's disclosable after the
16 investigation is done. That's the reason rule
17 you're proposing. But now I'm special purpose
18 grand jury member McBurney and I disagree with that
19 approach. I'm not going to tell you our
20 deliberation. I'm going to tell you how we came up
21 with what we came up with; why we did. I'm going
22 to tell you what several witnesses said because I
23 didn't like what they said or I really liked what
24 they said. Because their testimony isn't protected
25 in any way. Why could that not happen, or on what

1 basis could I forbid it from happening so that
2 there could be contempt if it did happen?

3 MR. WAKEFORD: Because the report is the
4 necessary result of the deliberations of the grand
5 jury.

6 THE COURT: So is a jury verdict. So is
7 an indictment. So is a general presentment or a
8 special presentment. It's the synthesis of. It's
9 the end product of. But it's not the
10 deliberations. And that's where if we end where we
11 began our part of the conversation that's what
12 Olsen is all about. It's just the deliberation.
13 You can't be in there. I can't be in there while
14 they're deliberating. What goes into it, witness
15 testimony. You actually could have had five
16 assistant district attorneys in there even if only
17 one of them was asking a question. No harm, no
18 foul. Once they're done -- again, why is it not
19 something that is disclosable? And if they can
20 disclose it, why wouldn't it then just generally be
21 disclosable. And that's sort of the end of the
22 curve ball.

23 MR. WAKEFORD: Right.

24 THE COURT: You either hit it or miss it.

25 MR. WAKEFORD: All of the results that

1 you've mentioned like an indictment or verdict,
2 there is a requirement under the law that those be
3 made public which we're sort of --we're going
4 around in circles. There is no requirement that
5 the special purpose grand jury be made public.
6 There is not a requirement. And again, we're going
7 to come -- we're going to see that the intervenors'
8 will likely come from the angle there's nothing
9 that says it has to be secret. Well, we're saying
10 there's nothing that requires it to be public.
11 It's its own document. And your Honor could forbid
12 them from speaking about its contents because right
13 now it hasn't been published in open court. It's
14 not in the possession of anyone in the state of
15 Georgia or in the United States of America other
16 than briefly your Honor and the District Attorney,
17 who is engaging in an on going criminal
18 investigation. And so it hasn't been publicized.
19 It hasn't been released. There's nothing that
20 indicates a requirement that it be released, and
21 the only result of a grand juror talking about it
22 would be to shed light on the deliberations and
23 also in the bargain interfere with the ongoing
24 criminal investigation which their report was meant
25 to be a part of.

1 THE COURT: So what odds do you give an
2 appeal of an order that I would enter forbidding
3 them from talking about the contents of the final
4 report? It gets appealed. Restrain of speech,
5 first amendment violation and special purpose grand
6 juror X just sends the Supreme Court or Court of
7 Appeals (Olsen). So how's that going to play out?
8 I appreciate I could do things to help maintain the
9 investigation and not get it prematurely derailed
10 by things that it ought not to have to deal with
11 until the time is right, and that's a decision that
12 the District Attorney and her team would make as to
13 when the time is right. That's an important
14 interest to uphold. You've got my full support of
15 that interest. But, I don't know. I need to think
16 through how that plays out. And if we have a grand
17 juror who says that's fascinating, you're not going
18 to release the report, but I'm going to talk. I
19 muzzle you. I suspect there'd be an appeal. I'm
20 not interested entering an order that we know is
21 DOA (dead on appeal).

22 MR. WAKEFORD: So, (1) your Honor,
23 respectfully. One thing I refuse to do is ever
24 handicaps odds of what the court of appeals will
25 and will not do.

1 THE COURT: We do that all the time, and
2 we're always wrong.

3 MR. WAKEFORD: You're right, your Honor.
4 What I'm saying is that the -- can I actually
5 confer with the District Attorney for one second?

6 THE COURT: Sure. Please. And you're
7 almost done.

8 (Pause in record for counsel to confer.)

9 (Record resumed.)

10 MR. WAKEFORD: So, there's two things I
11 wanted to highlight. And I appreciate you letting
12 me confer with Madam District Attorney.

13 THE COURT: Not a problem.

14 MR. WAKEFORD: The first is that our
15 position should not be understood to be a blanket
16 opposition to release of the report forever and
17 until the end of time.

18 THE COURT: I have not, not heard that
19 once. I have heard, I think, a reasoned approach
20 of not now and here's why. Likely later and here's
21 why. I haven't heard forever, bottle it up. So,
22 that's not my take away from what you've been
23 saying.

24 MR. WAKEFORD: But to your question what
25 will a future appellate court do? I think that's

1 an extremely relevant fact is that this is not
2 opposition that is intended to go to March to the
3 end of time and prevent public disclosure of what's
4 in this report forever. That's not the position.
5 It is simply saying that now is not the time, and
6 that your Honor has the power to pursue that.

7 THE COURT: It's like a temporary
8 sealing. We're going to seal this to include seal
9 the mouths of some the people until --and that may
10 put some additional pressure onto reach a finish
11 line sooner, but it's not the same pressure that
12 what's actually in the report. And if it says
13 certain things that complicates and maybe
14 compromises a more thoughtful approach to charging
15 decisions.

16 MR. WAKEFORD: I think that there is a
17 clear time to have this conversation when we have a
18 much better idea of how to proceed, and it is after
19 the District Attorney has announced either we will
20 not be pursuing charges or we will or --and here
21 they are. That I think is really what I'm saying.
22 But additionally, there are other constitutional
23 rights that are impacted. And those are the rights
24 of anyone who is possibly named in the report.

25 THE COURT: So I'm going to ask the media

1 intervenors' about that. But I guess we can end
2 with that. So let's say that your special purpose
3 grand juror X says, you know what, Oscar the Grouch
4 should be indicted. And we talked about it. And
5 my gosh, Oscar the Grouch should be indicted for
6 treason-- if that's a state crime-- for inciting a
7 riot based on what happened here in Georgia.
8 What's Oscar the Grouch --who's he suing? What
9 constitutional rights is he going to be invoking to
10 say, wait a minute, I can't believe someone said
11 that. And of course the someone isn't the District
12 Attorney. It's not you. It's either in the report
13 because it's published or it's coming from someone
14 who is not bound by any oath of secrecy to not talk
15 about witness testimony or the final decision of
16 the special purpose grand jury. Because the DA
17 brought this up as well. I get it in part, but I'm
18 -- crystalize it for me. So what does Oscar the
19 Grouch do? He hires a lawyer and that lawyer has
20 conference -- a press conference to say we're
21 outraged. We'll prove our innocence even though we
22 don't have to prove anything because we're innocent
23 until proven guilty.

24 MR. WAKEFORD: Well, we know that the
25 cases exist which your Honor actually refer to in

1 your order where there were discussions of public
2 officials seeking expungement of statements made by
3 grand jury's that were different in color than a
4 special presentment or an indictment. So, I guess
5 the simplest answer to this question is I'm not
6 totally sure, but we can avoid that question
7 entirely by not publicizing the report until after
8 the District Attorney has made --

9 THE COURT: Why tangle with it if you
10 don't have to.

11 MR. WAKEFORD: Exactly. There's just no
12 reason when the report is sure to be eventually
13 disclosed because the District Attorney is not
14 going to forever oppose it. There is no reason to
15 contemplate the release until there has been a
16 public decision made by the District Attorney of
17 the three options I have mentioned many times.
18 We're not pursuing anything. We plan to pursue
19 something or we have pursued it and here is a bill
20 of indictment. At that point we have a much better
21 idea of -- we don't have to worry about statements
22 made about individuals because they will either not
23 be any and we have a better idea of what to do or
24 there are and they are contained in a bill of
25 indictment.

1 THE COURT: Right. If Oscar gets
2 indicted and it's released and it says Oscar should
3 have been indicted, sort of I told you so. And if
4 Oscar's not indicted and the report said he should
5 be then someone could choose to explain from the
6 District Attorney's Office why Oscar the Grouch
7 wasn't indicted, but there isn't that cloud hanging
8 over Oscar's head in the interim.

9 MR. WAKEFORD: That's precisely right,
10 your Honor.

11 THE COURT: I'm not sure that it
12 necessarily invokes constitutional rights, but I
13 get the policy concern.

14 MR. WAKEFORD: Well, it also marches in
15 lock step with the concerns about an ongoing
16 criminal investigation. It's sidesteps all of
17 those problems. It also solves the issue of is
18 this a general or is this a special or is it -- it
19 sort of everything becomes clearer at a later date.
20 And we can come back and discuss in the clear light
21 of day as opposed to a lot of me standing here and
22 going well it could be this or it could be that and
23 you agreeing it could be that or this. And I think
24 the main point is today is not the time. Now is
25 not the time. But eventually, we will have a

1 better idea of when the time will be. And the
2 District Attorney's Office is not opposed to the
3 eventual release. It's opposed to it right now,
4 and it's opposed to releasing it without very
5 careful consideration in light of all the other
6 factors that are in play. I just ask your Honor
7 once again to consider the contents of what the
8 actual report ends up being. Because the law has
9 set up a situation where it could be little of
10 this, a little of that or something completely
11 different. And I think that's part of the reason
12 why we're here to sort of get an idea of what are
13 we even dealing with. And I would ask again if
14 there are further points of law, points of policy
15 or any other position that the District Attorney
16 should illuminate, that you will allow us a chance
17 to dig in on that and provide a written submission.
18 And otherwise, I remain available to answer any
19 other questions. Thank you.

20 THE COURT: Okay. Thank you so much.
21 Appreciate it.

22 So, Mr. Clyde, you're client's are going
23 to get the report eventually; can we go home?

24 MR. CLYDE: No, your Honor. Obviously,
25 we believe the report should be released now and in

1 its entirety. And that approach is consistent with
2 the way the american judicial system operates. In
3 other words, it is not unusual for a District
4 Attorney or a prosecuting authority to be generally
5 uncomfortable with having to release information
6 during the progress of a case. That occurs all the
7 time. But the judicial system time and time again
8 has said when matters are brought to the court
9 system we are going to be -- require them to be
10 made public because the faith of the public and the
11 court system is much improved by operating in a
12 public way. And so it's only in the most
13 extraordinary situations where our appellate courts
14 and where United States Supreme Court has allowed
15 the sealing of records or and including, as you
16 articulated, the outcome of grand jury activity.
17 We acknowledge the operations of the grand jury
18 while it was ongoing were subject to a veil of
19 secrecy. But that, as the Court has explained,
20 that has come to an end, and they have issued a
21 final report, and that final report is the outcome
22 of the judicial process, not an executive branch,
23 criminal investigation. They invoked the judicial
24 process of the special purpose grand jury statutes
25 and now that's special purpose grand jury has

1 issued a report and the jurors themselves have
2 asked for it to be published. There's enormous
3 public interest in what they have said, and that
4 exist in this state. It exist the across nation.
5 It exist beyond the nation. And we believe the
6 statutory law supports its public release right
7 now. We believe the case law supports its public
8 release right now. And we believe constitutional
9 law, including our own state constitution, requires
10 its release right now.

11 THE COURT: So why isn't this one of
12 those extraordinary circumstances where disclosure
13 wouldn't be the standard? I appreciate that you're
14 characterizing it as a judicial proceeding.
15 Because, of course, a judge had to be appointed to
16 supervise and ultimately received the report. But
17 I don't think Mr. Wakeford was misdescribing it all
18 that much. He didn't use the word "conduit," but
19 it basically was here, Judge, here's our report
20 that we prepared ultimately at the request of the
21 District Attorney to answer the questions that the
22 District Attorney had, not the Court had. The
23 Court didn't sua sponte-- could have-- but it
24 didn't, to be clear in this case. We want to know
25 more about what went on with the general election

1 in 2020. That was something that the District
2 Attorney asked for. Had to pull some levers to do
3 that, judicial levers. But it was executive branch
4 saying we want to investigate this. The mechanism
5 by which we investigate it is a grand jury, okay.
6 That means the courts have to be procedurally, not
7 substantively, but procedurally involved. And then
8 we get our report. We, the District Attorney's
9 Office, so we can figure out what we're going to do
10 next. How is that -- that's how things flowed.
11 And it did pass through a court proceeding because
12 I had to swear the jurors in and what not. But it
13 wasn't a trial. It wasn't a hearing. I didn't
14 issue any ruling. So I'm pulling it out of that
15 framework. I'm wondering how you say no, no, no,
16 it needs to stay in, in that framework. Or at
17 least why is it not one of these extraordinary
18 uncommon situations where it's really not a court
19 record that came out. I haven't filed it. There's
20 nothing that says I need to file it, which is
21 usually -- when you are invoking -- I asked you a
22 bunch of questions. So you'll get to answer. Rule
23 21 kicks in usually because there's something in
24 the docket that your clients can't get their hands
25 on. There's nothing in the docket and there's not

1 going to be anything in the docket unless I decided
2 that something needs to be published, and it
3 probably will be published by putting it in the
4 docket. There is no requirement it go in the
5 docket. So there isn't even a court filing that
6 we're talking about.

7 MR. CLYDE: Okay. Your Honor --

8 THE COURT: I'm done.

9 MR. CLYDE: I see that as three questions
10 and I'm going to answer them in order. Number (1)
11 I understand your analogy that this is a conduit
12 situation and I'm going to speak to that. And then
13 I'm going to speak to why there's really no
14 circumstances. There's none of the extraordinary
15 circumstances that would justify sealing, and why
16 in the end this is a Rule 21 document. And so let
17 me start first with this is a judicial process. I
18 understand your Honor's point that it was requested
19 by the grand jury. But it's actually an
20 extraordinary judicial process. In other words,
21 that request is made to this court and this court's
22 -- this -- not just Judge Robert McBurney's
23 courtroom, but the Superior Court of Fulton
24 County's power is invoked. Grand jurors are
25 required to come to this courthouse. Those -- and

1 that can't happen until a majority of the Superior
2 Court judges agree that this is a worthy thing to
3 undertake. So, it's actually an extraordinary
4 exercise of judicial power. And so I don't think
5 it can be characterized as just a we helped out the
6 executive branch. It is fully invoking the
7 judicial branch's power and requiring jurors to
8 come and devote their time and their energy to
9 carry out a purpose for this court system. And
10 that is the kind of environment where the case law
11 says that's judicial.

12 So the next question you asked is, all
13 right, isn't this one of those extraordinary
14 circumstances. And respectfully, I don't think the
15 State has made any showing of any substance that
16 this is -- that's one of those extraordinary
17 circumstances, and let me explain that. I respect
18 the District Attorney's statement about the
19 protection of other people, and that is an admiral
20 statement for a - for any District Attorney to
21 make. But other people, particularly the other
22 people that were involved in this grand jury are
23 represented by their own counsel. This hearing
24 took place, was widely published. Their counsel
25 aren't here. The risk of prejudice to them is

1 actually much less than it is with many many
2 documents that are disclosed during the judicial
3 process. Indictments get entered as the Court is
4 very well -- indictments get entered by the State
5 or by the federal government with a great deal of
6 detail. Sometimes press conferences that drive
7 defense counsel crazy. But there's never been any
8 suggestion, and there couldn't be that that process
9 should be closed. Hearings take place about the
10 exclusion of evidence or the exclusion of
11 witnesses. All those hearings take place publicly.
12 The documents related to them have to be disclosed
13 as court records. Those are much more --much
14 closer in time to a trial, so there's a much
15 greater risk involved in those documents. Here
16 we're -- if we're talking about risk to potential
17 defendants facing a trial years into the future
18 that this document is reeling, doesn't rise to the
19 level of the routine kind of documents that are
20 disclosed publicly during the judicial process. So
21 I don't think there's a compelling case for
22 protecting other people's rights.

23 The Court asked about, well, who does
24 somebody sue? The Court's exactly right; they can't
25 sue anybody. Long ago, the United States Supreme

1 Court in 1976, in Paul vs. Davis said no.
2 Government institutions are going to make
3 statements that have negative impact on people's
4 reputation. That alone will not ever create a
5 cause of action. You have to show something called
6 stigma plus. It has to be a deprivation of other
7 kind of rights. Simply reputational interest
8 aren't enough. So what the State is pointing to is
9 simply not the kind of information that justifies
10 sealing. And there hasn't been any suggestion, any
11 evidence, any presentation that really makes a
12 compelling demonstration that there should be a
13 sealing in this case. Ongoing investigation
14 --investigations obviously when people are indicted
15 they don't necessarily close. They continue
16 throughout a case. And so ongoing investigations
17 frequently continue after there is significant
18 disclosures of information about an investigation.
19 That's exactly what would occur here. As the Court
20 has pointed out, the House of Representatives
21 January 6th committee also has disclosed enormous
22 amounts of information. There's really no precise
23 showing that can support the kind of sealing that
24 they're asking for.

25 And finally, the Court asked, all right,

1 Rule 21. Really, why is this triggering Rule 21;
2 it's not filed. And your Honor, it is filed for
3 purposes of Rule 21. Let me explain what that is
4 for purposes of Rule 21. The question is not
5 whether it's submitted to the clerk. The question
6 is whether it is submitted to a judicial officer
7 that needs to take action on it. And that's what
8 triggers Rule 21. The -- I will give you a case
9 cite to that.

10 THE COURT: Please.

11 MR. CLYDE: And we're happy to provide
12 more authority on this issue. This is -- I'm going
13 to give you Forsyth vs. Hale. It is at 166 Ga.
14 App. 340. I'm quoting a part of it here. "A paper
15 is said to be filed when it is delivered to the
16 proper officer and by him received to be kept on
17 file." In this case that special report was by law
18 submitted to you as the supervising judge. Based
19 on that, immediately you had responsibilities. You
20 had to provide it to other judges and everybody to
21 reach a decision about whether this grand jury
22 could be dissolved. There were decisions that had
23 to be made. The power of this Court was invoked.
24 The decisions by you as the supervising judge had
25 to be made. And so overall it falls exactly within

1 the category of Rule 21. Now, I acknowledge that
2 there is a secrecy with respect-- that the Gwinnett
3 County grand jury decision recognize there's a
4 line. That Court -- the records that the grand
5 jury looked at during its ongoing process are not
6 accessible as court records. Because historically
7 they haven't been. But then the Gwinnett County
8 Supreme Court or the Court of Appeals in the
9 Gwinnett -- the Supreme Court in the Gwinnett
10 County decision emphasized the -- in that case that
11 general presentment had to be made public because
12 it was the outcome of this process. And so it was
13 subject to Rule 21, and essentially the same
14 process would apply here.

15 THE COURT: Was that grand jury a special
16 purpose grand jury or a regular grand jury?
17 Because regular grand jury's can do general
18 presentments as well. They're empowered to
19 investigate the Clerk's office. They could --
20 they're not going to indict the Clerk, but they
21 could say, hey, we noticed that they use too much
22 paper in the copy machines and we should be more
23 environmentally conscious.

24 MR. CLYDE: Exactly.

25 THE COURT: So if the case you're

1 referring to -- there are lots of Gwinnett cases.
2 So I'm not necessarily seizing upon the same one.
3 Was that a special purpose grand jury in which the
4 Supreme Court said that -- I know they use the term
5 general presentment, and we'll talk about report
6 versus presentment. But, setting that aside they
7 were saying that special purpose grand jury's,
8 general presentment must be made public because it
9 is effectively a filing.

10 MR. CLYDE: Correct. And it was a
11 general presentment from a grand jury, and in a
12 civil context. And I'm talking about 2008 In re:
13 Gwinnett County grand jury case. Justice Benham
14 held that that document was subject to Rule 21.
15 And we would submit the same thing would be --with
16 the same conclusion would be reached with respect
17 to the final report.

18 Your Honor has, and I understand the
19 questions relating to 15-12-80, and we're eager to
20 address that. But one of the things I want to
21 emphasize, I think, from the Court's questions, you
22 fully understand this, but those are two
23 independent basis for the disclosure of the report.

24 THE COURT: No, they are. And I pressed
25 Mr. Wakeford on them because it's sort of mounting

1 pressure, if you will. The grand jury itself said
2 you need to publish it. And if one travels to
3 15-12-80 -- actually, it's a "shall." There aren't
4 a lot of statutes that say the Court "shall." And
5 I've learned what that means. If it applies, if 80
6 applies. But I appreciate that that is a separate
7 basis. If I were to find that the final report is
8 effectively a Rule 21 filing, then Rule 21. And
9 all the case law that you and Ms. Gaither cited
10 that talk about the competing interest, and it
11 really is extraordinary and exceptional not to
12 disclose something that would fall under or within
13 Rule 21's gambit. So that would be a second and
14 compelling reason if I were to find the final
15 report is a Rule 21 filing.

16 MR. CLYDE: Exactly, your Honor. If I
17 may add one item to your desk is -- today we're
18 also going to provide the Court with another
19 example of a special report that was published.
20 This -- and this is a -- I'm going to provide a
21 copy to you in just a moment. It involves the
22 Gwinnett County Grand Jury, and it is from 2009.
23 It was then looking at land transactions, and Judge
24 Clark at the end where I put that -- may I
25 approach?

1 THE COURT: You may.

2 MR. CLYDE: Where I put the blue tab is
3 where Judge Clark has ordered this special purpose
4 grand jury report to be published in the legal
5 orbit. It is an example -- and I would say that
6 just as -- in a sense I would think that the two
7 special purpose grand jury reports that are before
8 the Court are in a sense examples of the two ends
9 of the spectrum. Obviously, in the Dekalb special
10 purpose grand jury they recommended prosecutions of
11 a named individual. And that was disclosed and
12 published by Judge Adams in the Dekalb situation.
13 In the Gwinnett situation, this is a grand jury
14 that found a great deal of discomfort and
15 criticized various aspects of the land purchasing
16 decisions made by Gwinnett, but generally is not
17 recommend prosecution, is moving in the other
18 direction. But in both cases they were published
19 in their entirety at the direction of the
20 supervising court judges in both cases. These are
21 special purpose grand jury's.

22 THE COURT: So these would be then
23 examples that it is possible to do it, and I
24 assumed it had been legally challenged, and -- and
25 a higher court had said the trial judge was in

1 error to do that, then Mr. Wakeford would have
2 shown me those opinions. So those are out there.
3 But what about his argument that if -- and I know
4 you don't know the content of the final report for
5 lots of good reasons. But what about the argument
6 that the contents should drive the decision making
7 process?

8 MR. CLYDE: So, your Honor, I'm going to
9 address--

10 THE COURT: Did I interrupt you before
11 you got all the--

12 MR. CLYDE: No, no, no. You raised
13 another issue that I'd like to cover, and I will
14 directly answer that question.

15 THE COURT: Okay.

16 MR. CLYDE: With respect to the Dekalb
17 special purpose grand jury -- and the Court may
18 already be aware of this.

19 THE COURT: Full disclosure. I was a
20 brand new judge and all of a sudden Mark Scott
21 Defendant was in front of me. There was a whole
22 lawsuit that came out of Dekalb about not handing
23 over that report to the rest of the bench. And it
24 -- so I'm a little familiar with that. Nothing
25 about publication. It was news -- I wasn't

1 interested in whether it was made public. I was
2 interested in getting Judge Scott out of my
3 courtroom.

4 MR. CLYDE: And the only thing I want to
5 point out is Burrell Ellis is ultimately prosecuted
6 for perjury in the aftermath of that special
7 purpose grand jury based on his testimony that was
8 presented at that special purpose grand jury. He's
9 prosecuted. He is --there's a verdict. He was
10 convicted at trial. And he ultimately on appeal --
11 parts of his conviction are affirmed. Parts of it
12 are reversed. But there's nowhere in that opinion,
13 and that opinion does recount the history of
14 special purpose grand jury, that it is anyway
15 critical of the release of the report nor did
16 Burrell Ellis and his counsel ever make any
17 argument that the release of the report somehow put
18 him in an impossible position at his trial. It was
19 -- it obviously as the Court has pointed out there
20 hasn't been a decision directly on point with the
21 issue that we're taking on today. But it is an
22 example of somebody who is prosecuted in the
23 aftermath of the release of a report, and it never
24 rose to the level of an issue worthy of appeal.

25 Then, your Honor, I'm going to address --

1 I apologize, I'm having trouble remembering --

2 THE COURT: It's all right. Mr. Wakeford
3 was making the argument that we could -- when I was
4 exploring reports, special presentment, general
5 presentment, that really depends on the content of
6 the document. And the more it is like a special
7 presentment, the more it is something that is an
8 investigative tool for the District Attorney as
9 opposed to a general report on here's the things we
10 learned and saw and what not. That would militate
11 towards not disclosing now because it's much more
12 like a detective's homicide report. That's not a
13 court filing. That doesn't get filed with the
14 Court. But that's someone thinking long and hard
15 about should the District Attorney bring charges
16 against someone for killing someone.

17 MR. CLYDE: And your Honor, in terms of
18 suggesting to the Court that it has discretion to
19 make independent judgments about what should be
20 public and what shouldn't be public, I do not
21 believe that that discretion exist in anything
22 other than the law of Rule 21 and the law of
23 essentially expungement of ultra vires activity.
24 In other words, what do we believe the case law
25 supports. We believe the Court is within its

1 rights to read the report. If this grand jury and
2 occasionally that happens -- and if this grand
3 jury has gotten outside the ambit of its mandate
4 and made statements that have nothing to do with
5 what its actual role was, that is appropriate for
6 expungement, we aren't disputing that. We only
7 note that that by implication suggest everything
8 within the scope of their mandate they're suppose
9 to be made public.

10 The second part is does the Court have
11 the authority to seal under Rule 21? Absolutely, it
12 does. But, it has to meet the Rule 21 standards.
13 And there is the -- there is -- the argument that
14 has generally come from the State today is, it is
15 uncomfortable this report being released until
16 we've made these decisions. And I don't fault the
17 expression of discomfort or --

18 THE COURT: I fully understand it. I
19 think it is a reasonable concern to raise. But if
20 I find that we're within the realm of Rule 21, it's
21 just not one that weighs really heavily in the
22 scale that I understand the analysis that higher
23 courts have performed. One doesn't ignore it, but
24 it's a lighter weight than the public's interest
25 and the general presumption that court filings are

1 to be made public.

2 MR. CLYDE: And your Honor, I guess we
3 would say it's not just a lighter presumption; it
4 doesn't meet the standard. In other words, the
5 discomfort of the prosecuting authority in
6 disclosing court records isn't enough to make them
7 sealed. It has to be significant identifiable
8 evidence that's going to cause a problem. And your
9 Honor, I don't think that submission has been made.

10 THE COURT: I have a question about that
11 standard. In your brief, page 18, you use the
12 phrase "clear and convincing proof." And clear and
13 convincing evidence, that is a standard out there
14 which is different from a preponderance. Much more
15 than that. It's not well-defined. It's less than
16 a reasonable doubt. It's actually what the JQC has
17 to use for judges. "Clear and convincing," and
18 that's the phrase you used. It's a whole lot more
19 than a preponderance. And I'm wondering if you
20 have case law for that or it was just a colorful
21 phrase trying to show that there is a burden that
22 the parties seeking to seal something has to meet.
23 And there is. But I'm not familiar with it being
24 clear and convincing evidence. That is a higher
25 burden than I weigh it and find in which way do the

1 scales lean. Where is the preponderance? Sealing
2 and not sealing. And that's why I was saying the
3 District Attorney's concern about timing and not
4 having the investigation unnecessarily rushed. I
5 think that is a factor that I can weigh. Your
6 point was -- my point was how heavily do I weigh
7 it. You said, oh, it doesn't weigh as much as
8 public interest. It might not, but there are other
9 concerns that the District Attorney raised. The
10 rights of folks who may be named in an unfavorable
11 report if that's how it works. So I envision the
12 process, the Rule 21 process to be stacking weights
13 on a scale just like a jury would in a civil trial.
14 I think that's a fair way to think about it. There
15 are heavier and lighter weights, but in the end I
16 need to decide are the scales leaning in the
17 direction of sealing or in the direction of having
18 this be an open record. I think I just need to see
19 that it is leaning in a direction. I don't think
20 it has to be leaning in a particularly strong way,
21 and clear convincing is that it has to be leaning
22 in a particularly strong way. So that was a long
23 way of saying where do you get clear and convincing
24 evidence as the standard?

25 MR. CLYDE: Your Honor, I believe clear

1 and convincing is the standard for closing the
2 courtroom. I would say the way you've described
3 the sealing of records is correct with this caveat.
4 The items that you are putting on the scale have to
5 be constitutionally cognizable issues. So, in
6 other words, a general statement that people's
7 reputations might get hurt has repeatedly been
8 identified by our appellate courts as not enough.
9 Not even beginning the discussion.

10 THE COURT: Okay. Because there's two
11 different things. Not enough is what you keep
12 saying, and I'm saying, okay, it's not enough
13 standing alone, but maybe there's more, other
14 factors. But then you shifted towards the end
15 saying actually that's not a factor at all. It
16 would be improper to put that on the scale because
17 it's not constitutionally cognizable. I'm not
18 disagreeing with you. I'm asking you to educate
19 me. Can I put whatever ought to be deemed
20 reasonable factors or there are cases out there
21 that say these kinds of thing might be someone's
22 concern but you may not put them on that scale to
23 decide which way the scales are leaning.

24 MR. CLYDE: I would say it's the latter.
25 In other words, that's simply -- that kind of

1 general articulation of potential injury to
2 reputation simply doesn't get -- make the scale.

3 THE COURT: It's not a factor to be
4 considered. Whether one considers it lightly or
5 greatly, it's not a factor.

6 MR. CLYDE: And if there is a detailed
7 showing about an individual made by their counsel
8 and the -- it was an extraordinary situation --

9 THE COURT: Stigma plus.

10 MR. CLYDE: Well, extraordinary typically
11 involves juveniles. Typically involves highly
12 private information. It doesn't involve public
13 officials who are involved in activities following
14 a national election. And so that's the part where
15 the fit is just not very tight. And so that's --
16 so -- but your Honor also brings up a good point
17 that I would like to react to. The only
18 organization that filed a brief in advance of this
19 hearing is us. The State has articulated their
20 argument today. We will plan to respond to that
21 argument with more detail so the Court has some of
22 the case law that has rejected sort of generic
23 concerns about reputation as a basis for sealing.
24 But I do think that is well established. And so
25 what we would submit is when it comes to that

1 weighing process, and Rule 21 itself requires that
2 it significantly outweigh that presumption of
3 openness. That when it comes to that weighing
4 process, I'd let the weight that you can put on the
5 closure side are really not compelling in the
6 situation that's before us here. And then on our
7 side we're talking about really one of the most
8 compelling situations for legitimate public
9 interest that I can think of in this courthouse.
10 In other words, there is genuine public interest in
11 what these grand jurors found after they sifted the
12 evidence. After they heard from all the witnesses
13 and its interest not just because of the role they
14 played on the grand jury but also because they are
15 community citizens. And speaking to these issues
16 from that vantage point as well. And so that's
17 also important and part of the public interest.

18 THE COURT: What is your response if I'm
19 the special purpose grand juror whose been told by
20 this judge you can't talk about your final report
21 to anyone, it's secret or at least I'm telling you
22 can't do it. And they look in the online person
23 and the lawyer Tom Clyde pops up. And you get a
24 call from the special purpose grand juror saying,
25 judge is telling me I can't talk about

1 deliberations, but I also can't talk about what any
2 witness testified about. In particular, I want to
3 tell people about this special purpose --our final
4 report because the judge isn't publishing it, but I
5 want to talk to folks about it. Can the judge tell
6 me I can't? I mean, yes, he can, because he did.
7 Can we challenge this judge, and what's our
8 strategy?

9 MR. CLYDE: Your Honor, I think they
10 could challenge that. In other words, as the Olsen
11 case makes clear they are now required to take a
12 oath and that oath was narrowed by the general
13 assembly. And so they are bound by that oath.
14 Could this court in extraordinary circumstances
15 impose what would be a prior restraint on their
16 speech? Yes, in extraordinary circumstances. But
17 as the court knows the extraordinary circumstances
18 to warrant a prior restraint are typically
19 situations, they're putting the national security
20 of the nation at risk. In other words, the
21 examples that have been used by the United State's
22 Supreme Court are the location of warships and time
23 of war, things like that. That can justify a prior
24 restraint. But here, as long as that grand juror
25 abided by the oath they were required to take and

1 the general assembly approved I think they're
2 within their rights speaking about the experience.
3 And this is specifically what the Supreme Court
4 case, USC Supreme Court case that says witnesses
5 that appear before the grand jury are allowed to
6 speak about their experience before the grand jury.

7 THE COURT: I think that the Olsen case
8 makes that clear. I'm not talking about witnesses,
9 they're going to do what they do. So you contend
10 that that would constitute a prior restraint saying
11 you can't talk about this. Well, what about the
12 notion that the final report is really just an
13 extension of their deliberations? It's not a
14 presentment. It's not the kind of thing that grand
15 jury's --it is specifically what this grand jury
16 came up with at the end, but it's not a general
17 presentment. It's not a special presentment. So
18 really they shouldn't talk about the final report
19 because it is just an extension of those
20 deliberations.

21 MR. CLYDE: Your Honor --

22 THE COURT: I'm not really compelled by
23 that question.

24 MR. CLYDE: It's a step too far. In
25 other words, as the Court has indicated the outcome

1 of grand jury process, the outcome of those
2 deliberations is a public document and
3 historically. And so that process of the
4 deliberations and an outcome gets rendered to the
5 court system is a significant and important step in
6 the process, but I don't think you could seal the
7 final report as being part of their deliberations.
8 And candidly, I think the statement by the special
9 purpose grand jurors that they wanted their report
10 published speaks to that. I don't think they see
11 it as an exposure of their deliberations. They see
12 it as this is the judgment -- I read it as they see
13 it. This is the judgment that we've reached, and
14 that's what the court system historically said that
15 document becomes public.

16 Your Honor, unless you have other
17 questions, I will not take any further of your
18 time, but what we would propose is that just as
19 Judge Adams did in Dekalb, that you order that the
20 report be filed with the Clerk's office, and I
21 think the expression you used was spread among the
22 minutes of the Court. And that it be published
23 pursuant to 15-12-80.

24 THE COURT: All right. Ms. Gaither,
25 anything you want to add? Did he cover it?

1 MS. GATHER: No, your Honor, he did a
2 pretty good job.

3 THE COURT: Mr. Wakeford, I have seen the
4 Post it notes flying in your direction, so why
5 don't you come on up here and let me hear any brief
6 rebuttal you may have.

7 MR. WAKEFORD: Brief, right, your Honor?

8 THE COURT: That's what the lawyer always
9 say and 30 minutes later we're still hearing. I'm
10 interested in what you've got to say in response.
11 And in particular, touch upon -- I'm not familiar
12 with the Forsyth case, 166 Ga. App. 340. I'll read
13 it, and I'll look for other cases like it. But I
14 was intrigued by this notion that there's case law
15 out there that one could use to characterize the
16 final report as a filing. Certainly not in the
17 clerk's possession right now and won't be anytime
18 soon. But because it came into the Court's
19 possession then it's a filing. And we are within
20 the realm of Rule 21 and not some place you'd
21 rather be.

22 MR. WAKEFORD: Right, your Honor. And I
23 think opposing counsel or counsel for the
24 intervenors' used an interesting phrase just a
25 moment ago. We progressed away from filing in open

1 court to just maybe sort of filing to render to the
2 court system, which is now we're so far from the
3 language that is contained in the case they cited,
4 In Re: Gwinnett County jury, that we're no longer
5 talking about a presentment made by the grand jury
6 in open court, which is what the language that the
7 Court chose, the Supreme Court chose in that case.
8 Additionally, they cite to a portion of the
9 language of that case in their brief at page 11. A
10 block quote from the Supreme Court's language where
11 they talk about Rule 21. And it's at the top of
12 page 11. They say "Rule 21 embodies the right of
13 access to court records which the public and press
14 in Georgia have traditionally enjoyed." And as
15 opposing counsel also pointed out there's no law on
16 point as to what to do here because there's
17 actually nothing traditional about special purpose
18 grand jury.

19 THE COURT: That's not the strong
20 argument for disclosure is that this report falls
21 into that category of traditional act. There's
22 nothing traditional about this report or this
23 process. I get that. That doesn't mean; however,
24 that it falls outside of Rule 21. It's just --it's
25 not a simple one, which is why we're having to have

1 this hearing. If this were an indictment, it's a
2 simple one and we don't have this discussion. And
3 it may be that there is the name of a critical
4 witness that the State is seeking to redact from
5 the indictment until it's appropriate to unseal
6 that piece because people haven't been arrested yet
7 or something. That happens all the time. That's
8 not this. This is different.

9 MR. WAKEFORD: Well, I would say that the
10 question of whether Rule 21 is applied in this
11 specific way -- going to your Honor's point, that
12 may be something that requires additional argument
13 from the District Attorney's Office because I
14 really think that demonstrates ably that we are not
15 within the realm court Rule 21, and that we are
16 much -- if we are this is a document that is much
17 more akin to a piece of an ongoing criminal
18 investigation, but you've heard me a lot on that.
19 I also want to point out that we got to take what
20 guidance we have, and 15-12-101 refers to a final
21 report not a general presentment. In other places
22 where reports are mentioned like 15-12-71 they say
23 report or presentment. That is not the choice that
24 was made in 15-12-101. Additionally, there is no
25 open court requirement there. There is only that

1 it goes to the supervising judge, and as we said in
2 this case to the District Attorney. That would --
3 that seems to indicate something to me that is
4 significant, but mainly that we are not in the
5 realm of a general presentment and certainly my
6 comments about the content guiding the analysis
7 remain. But let's go all the way to saying, okay,
8 fine, it is a general presentment. Even then
9 15-12-80 just says that the Court shall order
10 publication. But it also empower's the grand jury
11 to direct the manner. And there is no indication
12 from your Honor that the manner was prescribed by
13 the grand jury indicating to me that says once
14 again the district attorney is not opposing the
15 eternal oppression of the report. That your Honor
16 has discretion about the manner of publication.

17 THE COURT: Which here would be timing as
18 opposed to --

19 MR. WAKEFORD: Precisely.

20 THE COURT: No one's fussing about is it
21 put on a website or is it in a docket. It's really
22 all about the clock. When does it go to whatever
23 place that would be.

24 MR. WAKEFORD: Precisely, your Honor.
25 There could be conversations about specific

1 portions depending again on what the content of the
2 report is. But really going back to where we began
3 this is about timing. Yes, your Honor. That is
4 exactly correct. And since the grand jury's
5 preference has been afforded great weight as it
6 should be. And I'll take this opportunity to say
7 the District Attorney's Office, as I'm sure your
8 Honor is, are enormously grateful to these citizens
9 for the really above and beyond contribution of
10 their time, energy and efforts to this process. We
11 want to act with respect to their wishes, but we
12 also have to act in as stewards of an ongoing
13 criminal investigation of which they were a vital
14 part. And so with regard to the timing aspect we
15 think that that -- since they did not speak to
16 manner, your Honor has a discretion there, if this
17 is a general presentment. And so no matter which
18 route we take to get -- where we end up is it's a
19 question of timing and now it's just not the time.
20 The time will come and the District Attorney
21 committed to that idea, it's just not immediate.

22 THE COURT: Got it.

23 MR. WAKEFORD: Thank you, your Honor.

24 THE COURT: Thank you. Well, I want to
25 thank both sides for being prepared and having

1 these thoughtful presentations. This is not
2 simple. I think the fact that we had to discuss
3 this for 90 minutes shows that it is somewhat
4 extraordinary, Mr. Clyde. Partly what's
5 extraordinary is what's at issue here, the alleged
6 interference with a presidential election. But
7 it's also extraordinary in the plain meaning of
8 that word. Is that it's not ordinary to have
9 special purpose grand jury doing things. That
10 doesn't mean, however, that there hasn't been
11 course of conduct developed over time as to what
12 happens with special purpose grand jury reports or
13 presentments. It also doesn't mean that we can't
14 -- I can't figure out a way to assess the final
15 report through the lens of grand jury secrecy and
16 the statutory scheme for grand jury's as well as
17 viewing it through the lens of Rule 21 to decide if
18 it falls within the reach and scope of Rule 21, and
19 that's what I'll need to do. My proposal is that I
20 think about this a little bit and then contact both
21 groups, the District Attorney's Office and the
22 intervenors' if I've got specific questions for
23 which I'd like more input. And then you're welcome
24 to file something or provide an email that these
25 are the cases you should look at. I won't dictate

1 the format in which you respond. I will be sure if
2 I have questions, even though they may be for one
3 group and not the other --I won't say side. One
4 group and not the other -- they go out to both
5 groups because I may have a question for Mr. Clyde
6 and Ms. Gather, but Ms. Willis, your team may want
7 to be heard on that question even though it is
8 poking more at the media's position. As I said
9 early on they'll be no rash decisions. There's not
10 going to be an order that pops out with no notice
11 and attached to it is the report. There will be an
12 order if there's going to be disclosure that
13 perhaps says this is when it happens so that both
14 sides have a chance to react and take whatever
15 steps they want to take in light of an order that
16 says this is going to happen a little ways down the
17 line. So no one is going to wake up with the Court
18 having disclosed the report on the front page of a
19 newspaper. The report, of course, exist in the
20 District Attorney's control. So if it does show up
21 folks will need to work through that. But I will
22 circle back, and we'll figure out the best way to
23 move forward with this.

24 Ms. Willis, anything else from the
25 District Attorney's side?

1 MS. WILLIS: No. Thank you for allowing us
2 to be heard today.

3 THE COURT: Thank you for being here, all
4 your team.

5 THE COURT: Mr. Clyde, anything else on
6 behalf of the interveners?

7 MR. CLYDE: Your Honor, could I speak just
8 very briefly to one of the last things that you
9 mentioned?

10 We understand the Court will give the
11 opportunity for either side to take whatever action
12 they want in terms of appellate issues. We believe
13 the proper court -- if there's an appeal in this
14 case, we believe the proper court should be the
15 Georgia Supreme Court. And we believe the Georgia
16 Supreme Court would be interested if that's the
17 direction it takes. But I will point out to your
18 Honor that the constitutional argument we are
19 making would have to be reached by your Honor in
20 order for that to be the clear choice and the
21 clearly appropriate court for resolution of the
22 issue. So that is an area we hope the Court will
23 reach.

24 THE COURT: I appreciate your concern.
25 And I think if there is a ruling of nondisclosure

1 it would need to address the different basis and
2 each of the basis that you raised. That it's not
3 secret. That it does fall within Rule 21. And so
4 I think you'd find the tell holds you need to do
5 what you need to do if you feel that's appropriate
6 what you need to do it. That's the end result.

7 MR. CLYDE: Thank you, your Honor.

8 THE COURT: That's it. Thank you
9 everyone.

10 (Whereupon, the proceedings are
11 concluded.)
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF GEORGIA:

COUNTY OF FULTON:

I DO HEREBY CERTIFY THAT THE FOREGOING
PAGES ARE A TRUE, COMPLETE AND CORRECT TRANSCRIPT
OF THE PROCEEDINGS TAKEN DOWN BY ME IN THE CASE
AFORESAID. (AND EXHIBITS ADMITTED, IF APPLICABLE).

THIS CERTIFICATION IS EXPRESSLY WITHDRAWN
AND DENIED UPON THE DISASSEMBLY OR PHOTOCOPYING OF
THE FOREGOING TRANSCRIPT, OR ANY PART THEREOF,
INCLUDING EXHIBITS, UNLESS SAID DISASSEMBLY OR
PHOTOCOPYING IS DONE BY THE UNDERSIGNED OFFICIAL
COURT REPORTER AND ELECTRONIC SIGNATURE ARE
ATTACHED THERETO.

THIS, THE 13TH DAY FEBRUARY, 2023

/s/ Karen Rivers
*** (KAREN RIVERS), CCR-***2575
RPR, OFFICIAL COURT REPORTER
SUPERIOR COURT OF FULTON COUNTY

EXHIBIT “B”

Grand Jury Presentments

- Staff
- Nov 3, 2010 Updated Jan 25, 2016
- _0
 - Facebook
 - Twitter
 - Email
- Facebook
- Twitter
- Email
- Print
- Copy article link
- Save

REPORT AND SPECIAL

PRESENTMENTS

OF THE

SPECIAL PURPOSE

GRAND JURY -

2009-2010

IN THE SUPERIOR COURT

GWINNETT COUNTY,

GEORGIA

MAYDEL MASSELLI-MONTERO,

FOREPERSON

WILL C. WARRICK, III,

VICE FOREPERSON

JANICE N. MCCLOSKEY,

CLERK

OLIVER BOJARSKI,

DEPUTY CLERK

Report and Presentments of the Special Purpose Grand Jury

The 2009 - 2010 Session of the Gwinnett County Special Purpose Grand Jury consisted of the following members:

Maydel Masselli-Montero, Foreperson

Will C. Warrick, III, Vice-Foreperson

Janice N. McCloskey, Clerk

Oliver Bojarski, Deputy Clerk

Emily D. Chesser

William K. Conklin, Jr.

Randall Cunico

Art Cuthbert

Tamara (Tammy) L. Delk

Dawn Fischer

Sandra Franklin

Kenneth Gauthier

Joseph Gentry

Brian Green

Sally Gustafson

Latonya .Holt

Robert Johnston (excused)

Carole de la Cruz Jones

Ronald (Ron) D. Miller

Holly Shelnutt

Randy Sneed

David Charles Steffes

Joseph Yeager

INTRODUCTION

The Special Purpose Grand Jury was empanelled by a vote of the Superior Court judges on November 9th, 2009. We have been hearing evidence essentially every other Friday since December, 2009. During that time we have followed the order which empanelled the Grand Jury and inquired into the acquisition of land by the Gwinnett County Board of Commissioners from 2004 until 2009. Utilizing a methodology which will be described later, the Grand Jury made a detailed inquiry into five land acquisitions which were ostensibly purchased for parks. It should be noted at the outset that none of the properties, three of which were purchased in 2007, are currently being utilized as parks.

The Grand Jury has diligently inquired into the standard county practices for land acquisitions, and the results of deviations from these practices. The information that we were required to review was so voluminous that the District Attorney was forced to establish a secure website to produce the documents in an electronic format to make these documents available for review. We heard the testimony of over 70 witnesses both from county government and the private sector. It is this evidence which allows us to reach our conclusions and make our recommendations.

From the beginning, each individual Grand Jury member believed that we were engaged in important work. It was our goal to determine whether or not the elected officials and county employees were making decisions that were proper, legal, and wise in the expenditure of taxpayer money. This task was undertaken at no small price, both personally and financially, by each Grand Jury member. The Grand Jury wishes to express our appreciation to member Robert Johnston who stayed with us as long as he could until financial and work issues forced him to seek an excusal. It is unfortunate that the individual elected county Commissioners did not take our task as seriously. In fact, one was heard to say in the Grand Jury waiting room that we were "a pain in the ass." The Grand Jury regrets that an elected official would make such a remark. It is particularly worrisome that this remark was made about a group of citizens who were

summoned to be grand jurors and have been performing their civic obligation for the last ten months.

The Grand Jury wishes to thank and commend many of the witnesses who appeared before us, including members of the county staff, who brought records for our review, prepared for their testimony by looking at notes and documents and in several cases prepared presentations and charts to assist us in understanding their testimony. In particular the Grand Jury wishes to thank and commend former Commissioner Lorraine Green for her willingness to appear on numerous occasions. The Grand Jury also appreciates her prepared and knowledgeable testimony as well as her familiarity with the community.

By contrast, under oath, every single sitting County Commissioner testified that they had not reviewed any of the readily available documents prior to their testimony. This failure to prepare in even the most basic way for their appearance resulted in a lack of recall about most important facts of each transaction. It is the Grand Jury's opinion that this failure to prepare for their appearance in any meaningful way is not only an insult to the Grand Jury but is consistent with the way in which decisions are made involving millions of taxpayer dollars.

That being said, it is our purpose that the citizens of Gwinnett County know the results of our investigation, hear our recommendations and that the judges of the Superior Court consider our work complete.

HISTORICAL CONTEXT

The Grand Jury heard testimony that prior to late 2007, the County was actually in competition with developers in its efforts to acquire land for various government purposes such as parks, water treatment, and roads. Prior to 2007, in order to be competitive, county government often paid more than the appraised price of land. In fact, this was so common that oftentimes the first offer to buy made by the County was

appraised value plus ten percent. The Grand Jury heard examples of purchases prior to 2007 where even this offer was insufficient to induce sellers to sell.

In late 2007 and certainly by 2008, the real estate market collapsed. Prices for raw land plummeted and proposed developments were foreclosed on. Yet, the Grand Jury heard testimony from the Director of Support Services and from the current elected County Commissioners that county government continued its practice of offering, and paying, at least the appraised price plus ten percent.

Neither the Director of Support Services, nor the commissioners could provide the Grand Jury with a plausible explanation for continuing the practice.

STANDARD PRACTICES

IN LAND ACQUISITION

In our first 3 meetings the Grand Jury was presented evidence about how land is acquired by county government in the normal course of business. In general, we found that several departments are involved in land acquisition depending on the purpose for which the property is being acquired.

Department of Support

Services

The Grand Jury heard testimony from Steve North, the Director of Support Services. He testified that the role of his department in land acquisition was two-fold. In the case of park acquisition, once a need had been established for a park or a particular tract had been identified, he was notified by the Director of Community Services, Phil Hoskins. He would then direct his staff to either locate a suitable parcel or parcels to meet the need or to conduct an evaluation of an identified parcel.

The evaluation process consisted of several steps. First, employees of Support Services would research the property using available county resources to determine the apparent suitability of the property for the proposed purpose. The owner of the property may also be contacted to determine if there is an interest in selling and at what price. The second step was to receive Board of Commissioners' approval to obtain an appraisal of the property. If approval was denied, the process would end.

After the appraisal was approved, North would request bids from a list of approved appraisers, select the lowest qualifying bidder and have the appraisal done. Once the appraisal was done, the results of the work of Support Services would be presented to the Board of Commissioners in an executive session. Since 2006, the commission has adopted a rule that there can be no vote on land purchases in executive session, these votes must be made in an open public meeting. Based upon this rule, Mr. North testified that if he receives a "consensus" from the Board and "direction" from the Board he moves forward to the next step.

Mr. North could not, nor could any present or former county employee, describe how he determined that there was a "consensus." It was variously described as "no one said anything," "no one disagreed, everyone nodded." The consensus or directions to Mr. North are not recorded in any county document and as we learned later, no elected commissioner had a clear recollection of the meetings. In fact, on at least one of the transactions reviewed in detail, there was a strenuous disagreement about the purchase price between Chairman Bannister and Commissioner Beaudreau, but this was described by county staff that they left the meeting believing there was a "consensus" to purchase the property at a higher price. This is a common practice which ended up costing taxpayers \$1,152,662.00. To date, the Grand Jury has not been provided with an explanation of this "consensus"

concept but does note that Webster's Dictionary defines consensus as:

a) general agreement; unanimity

b) the judgment arrived at by most concerned

Mr. North then testified that once a consensus had been arrived at, he was authorized to negotiate a purchase price within the limits set by the Board. If an agreement could be reached with the seller, the documents were delivered to the Law Department for the preparation of a formal offer which was then submitted to the Board of Commissioners for approval to purchase. No purchase or offer was final until approved by the Board.

Mr. North also testified that his department was responsible for the purchase of land for other facilities such as fire stations, police precincts and libraries but that the process was the same.

Since the Grand Jury did not select any acquisitions by this department for further review, we have no comment on the operation of the Department of Support Services. The Grand Jury does note that Director Steve North provided us with documents which supported his testimony and answered our questions.

DEPARTMENT OF

COMMUNITY SERVICES

The Grand Jury heard testimony from Phil Hoskins regarding the role of his department in land acquisitions. Mr. Hoskins testified that land needs for his department were identified from two primary sources. First was the Master Plan developed by county staff and approved by the Board of Commissioners in 2004 and 2007. The second was the traditional practice of placing a large "active" park near high schools so that the park athletic program would support the athletic program at the high school. Mr. Hoskins testified that there was no formal process in place between the county government and the Gwinnett County Public Schools to coordinate this process.

Once a need had been identified, the process of acquisition was turned over to the Department of Support Services to handle the acquisition. Mr. Hoskins testified that he

was present at executive sessions when properties related to his department were presented to the Board. He also attempted to describe to the Grand Jury the "consensus" concept.

Since the Grand Jury did not select any acquisitions by this department for further review, we have no comment on the operation of the Department of Community Services. The Grand Jury does note that Director Phil Hoskins provided us with documents which supported his testimony and answered our questions.

LAW DEPARTMENT

Karen Thomas, the County Attorney testified that the role of her department fell into two general categories. First, her department is responsible for the preparation of all legal documents related to the purchase in the "standard acquisition." Second, her department is responsible for litigating or overseeing the litigation of re-zoning cases, condemnations and all other cases which may arise out of land acquisition. In the course of preparing for litigation, county attorneys are authorized to hire appraisers of their own choosing as expert witnesses without the necessity of Board approval.

Since the Grand Jury did not select any acquisitions by this department for further review, we have no comment on the operation of the Law Department. The Grand Jury does note that Karen Thomas provided us with documents which supported her testimony and answered our questions.

DEPARTMENT OF

WATER RESOURCES

Lynn Smarr, the Director of Water Resources testified that her department acquired land for sewer and water lines, pump stations and treatment facilities. These acquisitions were handled within the department and no property could be purchased without Board approval.

Since the Grand Jury did not select any acquisitions by this department for further review, we have no comment on the operation of the Department of Water Resources as it relates to land acquisition. The Grand Jury does note that Director Lynn Smarr provided us with documents which supported her testimony and answered our questions.

DEPARTMENT OF

TRANSPORTATION

The Grand Jury heard testimony from Brian Allen regarding land acquisition by his department. Mr. Allen described that his department was responsible for acquiring land for roads including intersections and rights of way. He described that his department acquired land in accordance with the Transportation Master Plan through either purchase or condemnation. Land acquisition was done within the department.

Since the Grand Jury did not select any acquisitions by this department for further review, we have no comment on the operation of the Department of Transportation. The Grand Jury does note that Director Brian Allen provided us with documents which supported his testimony and answered our questions.

GENERAL FINDINGS

- It should be noted that none of the acquisitions reviewed by the Grand Jury followed the procedures outlined by these witnesses.
- The procedures described above are not in any comprehensive document or procedure manual that the Grand Jury could find.
- No present or past commissioner who testified before the Grand Jury displayed any familiarity or understanding of this process.

- Land parcels in which the county may be interested in purchasing are identified from a variety of sources including inquiries from sellers, contacts with individual commissioners, and investigation by county employees.
- No parcel would be put on an executive session agenda for review by the Board unless staff received the approval of the District Commissioner for the district in which the land was located or the approval of the Chairman.

METHODOLOGY

The Grand Jury was presented evidence that as of November 13, 2009 the county government owned approximately 4,682 discrete parcels of land. These parcels ranged in size from several hundred acres to parcels which could be measured in square feet. We were then presented evidence that during the time period from 2005 to 2009 the county acquired 1,156 parcels of varying sizes.

We quickly realized that to examine each transaction during the relevant time period would be impossible for a group of twenty-three citizens had been asked to "put aside the press of their everyday lives" and serve as Grand Jurors. At the suggestion of the District Attorney, we developed a set of criteria to evaluate the purchases to determine which transactions would be reviewed.

We applied these criteria to all of the land acquisitions and arrived at seventeen (17) potential properties. Of those seventeen (17) we selected five (5). After ten months of evidence and after hearing testimony twice a month for those ten months we are confident that we have enough information to draw our conclusions and issue this report.

The criteria which the Grand Jury used to filter the transactions were as follows:

- Was the transaction initiated by an individual commissioner? (As opposed to initiated by staff as part of a Master Plan)

- Was the transaction to settle litigation?
- Was there a relationship between the seller and the commissioner who initiated the purchase?
- Was there a significant difference between the county's appraisal and the purchase price?
- How long had the seller owned the property before it was sold to the county?
- Was the parcel suitable for the proposed use?

The information to answer these questions was provided from public records, the testimony of investigators from the District Attorney's Office and from the testimony of the previously mentioned county employees.

The properties which were initially selected for review were identified by the Grand Jury as follows and each transaction will be described in detail in this report.

RABBIT HILL PARK

EXPANSION

Summary of the Transaction

The Rabbit Hill Park expansion was actually made up of three separate transactions spanning several years and involving a number of parcels. The stated purpose for the acquisition was to provide an expansion of the existing Rabbit Hill Park and/or to settle pending litigation.

According to the evidence that was presented, these tracts of land are located along Rabbit Hill Road in Dacula and are across from and adjacent to the existing Rabbit Hill

Soccer Park. The three transactions resulted in the acquisition of 124.3 acres by the Gwinnett County Board of Commissioners in 2005 and 2007.

Transaction 1

According to the testimony of James Braden, he purchased a tract of land on Rabbit Hill Road in 2003 primarily to reinvest funds from another transaction primarily for tax reasons. The tract was a roughly triangular piece of property consisting of approximately 19.5 acres. When Braden purchased the property, it was zoned as part of a Light Industry District (M-I) and was physically located in the district represented by Commissioner Kevin Kenerly.

In February 2003 Braden applied to have the property re-zoned for multi-family residences at a density of 8 units per acre (RM-8). A vote by the Planning Commission on November 2003 denied the zoning as requested but allowed for detached single family dwellings (R-ZT Detached). The Board of Commissioners upon motion of Commissioner Kenerly, voted to modify the original zoning request to R-ZT Detached.

After the re-zoning was approved, as modified, Braden and the Gwinnett County Board of Commissioners were sued by Publix Supermarkets who operated a large distribution facility on an adjacent tract. Publix contended that placing residences so close to the distribution center would lead to a disruption of their business.

In order to settle the lawsuit, the Board of Commissioners purchased the tract for \$1,903,163.00 and entered into certain agreements regarding future development of the property.

Transaction 2

The second transaction in the Rabbit Hill expansion involved several tracts with an aggregate of 90.58 acres. The evidence before the Grand Jury showed that D.G. Jenkins Development Corp., a corporation owned and operated by David Jenkins

purchased the property in November of 2005 for \$7,981,400.00. When Jenkins purchased the property there was a pending re-zoning application filed by the seller C.E. Smith to zone the property from R-100 (Single Family Residence) to R-ZT (Residential Zero Lot Line/Townhouse). Jenkins, represented by the law firm of Mahaffey, Pickens and Tucker amended the application to include some commercial development on two of the included tracts.

In July of 2006, the Board of Commissioners denied the applications and left the property zoned R-100 for the commercial application. The residential application was approved as R-100 modified and R-ZT. In light of the re-zoning decision and its effect on his planned development, Jenkins instructed his attorneys to file suit against Gwinnett County.

In April of 2007 Jenkins transferred ownership of the property from D.G. Jenkins Development Corporation to Sydney Investments for a stated purchase price of \$10,390,554.00. This transaction was described by Jenkins as a "cash out" transaction that did not change the real ownership of the property or his plans for developing the property.

In May of 2007 based upon a motion by Commissioner Kenerly, the County agreed to purchase the property for \$16,260,000.00 as an active park and to settle the lawsuit.

Transaction 3

The third transaction was the acquisition of 14.2 acres located adjacent to Rabbit Hill Park. The testimony disclosed that the property was purchased in May of 2006 by Charles Ashworth d/b/a/ Cidpro, Inc. This purchase was made to acquire a full interest in the property from a partnership in which Mr. Ashworth was a partner. The

purchase price in 2006 for 14.22 acres was \$370,865.00.

Mr. Ashworth applied in August of 2007 to change the zoning to R-ZT. This application was denied by both the Planning Commission and by a vote of the Board of Commissioners. The zoning was modified from RA-200 to R-60 with the stipulation that the owner donate approximately 4 acres to the County.

Based upon the vote of the Board, Mr. Ashworth instructed his attorney Lee Thompson to file suit against the County. In October 2007 Ashworth sold the property to the County for \$1,000,000.00 partially based upon the purchase price paid to Jenkins and Braden. This payment was made in settlement of the litigation and as an expansion of Rabbit Hill Park.

TESTIMONY OF WITNESSES

Based upon our findings and recommendation, the Grand Jury believes that a presentment or report is not the appropriate forum to report our findings.

FINDINGS OF THE GRAND JURY

Based upon a review of all the evidence and testimony of witnesses, the District Attorney is directed to prepare a Bill of Indictment which charges Kevin Kenerly with one count of Bribery and two counts of Failure to Disclose Financial Interest. The Bill of Indictment is to be served upon Kevin Kenerly in accordance with law and brought before us for our consideration on October 8, 2010.

PEACHTREE INDUSTRIAL

BOULEVARD PROPERTY

Summary of the Transaction

The Grand Jury heard testimony and received evidence regarding a tract of land located on Peachtree Industrial Boulevard which consisted of 66.635 acres.

In the Spring of 2006, this parcel of land was identified as a possible site for an active park for the new Lanier High School cluster. Pursuant to procedure, the Department of Support Services contacted the owner, Mr. Wendell Starke to determine his interest in selling. Mr. Starke indicated that he would be willing to sell for the price listed in an appraisal he had obtained which was approximately \$10.5 million dollars. The Department of Support Services obtained an independent appraisal which placed the value at \$10.89 million dollars. Mr. Starke indicated that he would be willing to sell at his original price.

Former County Administrator Jock Connell testified that on six different occasions between September 2006 and March 2007, he requested permission from the district commissioner, Kevin Kenerly, to place the purchase on an executive session agenda to get Board approval to move forward with the purchase. On each occasion, permission was denied.

By April of 2007, Mr. Starke was frustrated by the lack of action by the County and accepted an offer from Brickton Commercial Partners, LLC to buy 58 acres of the parcel for \$9.995 million dollars. The property was placed under contract during the first week of April, 2007.

Brickton Commercial Partners is a company owned by David Bowen, Thomas Michael Phelps, Jr. and Eric Cape. They testified that they

purchased the property for development but that after they put the property under contract, they were informed by Mr. Starke's agent that the County had been interested in the property. The partners instructed their attorney to inquire about the County's interest and set an asking price of 13.95 million dollars. The attorney, Lee Tucker of Mahaffey, Pickens & Tucker confirmed the interest and communicated the asking price.

Brickton closed on their contract and purchased the property on August 6, 2007. The Gwinnett County Board of Commissioners, upon motion by Kevin Kenerly, voted to

purchase Brickton's 58 acres on August 7, 2007. The County closed with Brickton on August 14, 2007 paying the asking price of \$13,950,000.00.

TESTIMONY OF WITNESSES

The Grand Jury acknowledges that when we first applied the criteria for review to this transaction, there were several areas of concern. However, after a complete review of the evidence only one question remains

unanswered.

Mr. Wendell Starke testified that in the Spring of 2006 he was prepared to sell the entire tract of land to Gwinnett County and entered into good-faith negotiations with the County.

The county staff, including Steve North and Jock Connell, testified that they were ready to move forward with the purchase as early as September, 2006.

The principals of Brickton Commercial Partners, LLC testified that they had been interested in the property and had made prior offers since 2001. They testified that Mr. Starke's agent approached them in March of 2007 and that they put the property under contract during the first week of April, 2007. Their stated intention was to build a development similar to the Suwanee Town Center. They particularly believed this development would be successful since the proposed Sugarloaf Extension was slated to end right in front of the property. The timing of the closing date was adequately explained by both the principal and their bankers as having to do with financing considerations. The Grand Jury finds nothing improper regarding the purchase of the tract by Brickton.

The principals of Brickton testified that they learned of the County's interest in the property after placing the property under contract. This was confirmed by Mr. Starke

and his agent. The principals then testified that because they wanted to resolve the issue with the County they set a "take it or leave it" purchase price: The County took it.

Commissioner Kevin Kenerly did not testify and asserted, through counsel, his Fifth Amendment right against self-incrimination. The delay from September 2006 until April 2007 was never explained.

FINDINGS OF THE GRAND JURY

The Grand Jury had been unable to ascertain the reason why Commissioner Kenerly would not allow the land purchase to be placed on the Executive Session agenda for review by the entire Board. This transaction is a prime example of the custom of district courtesy gone wildly out of control. No Commissioner should be allowed by rule or custom to control the agenda of the entire Board. Staff should be allowed to take it upon themselves to bring a matter of this magnitude to the entire Board or, at the very least, to the Chairman for action. This example of blind adherence to custom cost the taxpayers three point four million dollars.

LAKES PARKWAY

PROPERTY

Summary of the Transaction

The Grand Jury heard testimony and received evidence that this is an 8.27 acre parcel located on Lakes Parkway outside of Lawrenceville. The property is located in District 1 which was represented by former Commissioner Lorraine Green until January 1, 2009 when Commissioner Shirley Lasseter took office. The property was acquired by Elite Land Development, Inc. in April 2005 for \$300,000.00. The principle owner of Elite, Joe Dixon, testified that the original purpose of the purchase was to build office condos and that in fact he had begun development of the project with the installation of

infrastructure. However, because of financial issues and the failing economy, he was unable to complete the project.

In 2007, Elite through its agent initially approached the County to purchase the land for a park or as a headquarters for a central library.

On February 17, 2009 the Gwinnett County Board of Commissioners voted to purchase the 8.27 acres for \$1,161,500.00 from Elite. The purchase was placed on the consent agenda and approved by consent. The proposed use was for a trailhead of 35 acres already owned by the County.

TESTIMONY OF WITNESSES

Mr. Phil Hoskins, the Director of Community Services first became aware of the property when it was proposed as a possible site for a central library. He did not recall who brought it to his attention but he rejected the site because of its location. When asked to consider alternate uses, Mr. Hoskins stated that the property provided entry to approximately 25 acres already owned by the County but that it would require access across the Yellow River. He stated that he had a feasibility study done which indicated that a twelve foot wide pedestrian bridge would cost approximately one million dollars. The cost of the bridge was included in the PowerPoint presentation which was made to the Board of Commissioners in Executive Session.

Mr. Steve North testified that as Director of Support Services he was assigned by the Board of Commissioners to negotiate the purchase of the Lakes Parkway property on behalf of Gwinnett County. He stated that on January 6, 2009 the Board was first presented the property in Executive Session and requested a cost estimate on the bridge. On January 20, 2010 the tract was brought up again including the cost of the bridge and Mr. North was authorized to negotiate a purchase price of appraisal plus up to fifteen percent (\$1,000,000.00 + up to 15%).

Mr. North stated that by January 20, 2010 he knew that sitting Senior Judge James Oxendine was acting as an agent for the seller. On or about January 20, 2010 he contacted James Oxendine at his office in the courthouse to deliver the preliminary offer letter with the offer of appraised value. Oxendine told him that rather than mail the letter, North could just bring it over to his office. That is exactly what North did.

North testified that James Oxendine, upon receipt of the letter in his office, made a counter offer of appraised value plus 10 percent. North agreed and the purchase price was set at one million one hundred and eleven dollars. North testified that on January 30, 2010 he received a call from James Oxendine and again met in Oxendine's office in the courthouse. Oxendine told North that he knew North's authority to negotiate was appraised value plus 15 percent and that he needed to change the purchase price to reflect that amount. Mr. North testified that he was surprised that Oxendine was aware of the limits of his authority. Based upon that knowledge and the position of James Oxendine as Senior Judge he felt further negotiations would not be feasible.

Former County Administrator Jock Connell testified that he first became aware of the property when it was brought to his attention by former Senior Judge James Oxendine. Mr. Connell testified that Mr. Oxendine indicated that he was representing the sellers, that they needed to sell, and proposed that the County purchase the property for a library site. Mr. Connell stated that Mr. Oxendine met with him four to six times to press the sale since Connell was not inclined to recommend the purchase of the property. He stated that the property could possibly be used to "fill a gap" in that area of the county but its acquisition was not a staff priority. Mr. Connell stated that he was convinced that a member of the Board of Commissioners disclosed the limits of the negotiating authority granted by the Board.

Commissioner Kevin Kenerly, Bert Nasuti and Mike Beaudreau all testified that they deferred to Commissioner Shirley Lasseter in this land acquisition because of district courtesy and therefore had very little knowledge of the transaction. They denied knowing about the cost of the bridge when they voted to purchase. They denied knowing that James Oxendine represented the seller.

Commissioner Shirley Lasseter testified that she took office in January, 2009 as District 1 Commissioner. She stated that she first learned of the proposal to purchase the property in Executive Session. She did not recall the specific authorization given to Mr. North. She stated that she did not know James Oxendine was the seller's agent. She stated that she had looked at the property. Mrs. Lasseter denied that she initiated the purchase and then she relied on staff to work out the details and bring the purchase forward when they were ready. She acknowledged that it was logical that she would have initiated the process, and that she should have been the one to put the matter on the Executive Session agenda but denied doing so. She testified that she did not know about the change in purchase price and the negotiation with James Oxendine.

Former Judge James Oxendine testified that he did not consider his actions to be engaging in the practice of law. He stated that he was doing a favor for the son of his old friend Randall Dixon and took no fee. He stated that it was common knowledge that Gwinnett County paid 15 percent over the appraised value and he had just made a mistake when he agreed to 10 percent. He denied that he had received any information from any County Commissioner about the negotiation authority granted to Mr. North.

FINDINGS OF THE GRAND JURY

First, it was a stunning revelation to the Grand Jury that no member of the county staff expressed any reservations about being involved in a real estate transaction where a sitting Senior Superior Court Judge is acting as the seller's agent. If the Commissioners who testified are to be believed, it is inconceivable that this information was not disclosed prior to any vote to purchase. Leaving aside questions of fees and negotiating a land deal in a judge's office in the courthouse, the sheer impropriety of this representation should have been a warning sign.

Second, despite testimony to the contrary by County Commissioners, they were presented with information regarding the cost of the pedestrian bridge prior to the vote to purchase. The evidence is clear on that fact. They weren't paying attention.

Third, it is the conclusion of the Grand Jury that the information regarding the negotiation authorization was given to James Oxendine after he signed the initial purchase price agreement. Also it was common practice for the Board of Commissioners to authorize 10 percent over appraisal not 15 percent. An examination of all of the evidence, including the relationships of the parties, can only lead to the conclusion that it was a member of the Board of Commissioners who disclosed this information. While this conduct may not constitute a crime, it is certainly a bad business practice which led to an unfair benefit to the land seller in this case.

The Grand Jury believes that the conduct of former Senior Judge James Oxendine was inappropriate if not unethical. However since he has left the bench there seems to be no sanction available for us to recommend.

Commissioner Shirley Lasseter testified about her recollection of the events which led up to this property acquisition. After observing her demeanor and hearing her testimony the Grand Jury specifically recommends the following:

1. That Commissioner Lasseter develop at least a basic understanding of the land acquisition process;
2. That Commissioner Lasseter become more engaged in issues which affect her district and the entire county;
3. That Commissioner Lasseter must understand her role as a policy maker and decision maker rather than relying on the county staff to do her work for her.

In conclusion, the Grand Jury can find no rational, reasonable basis for the acquisition of this property other than to bail out the son of an old friend of several members of the Board of Commissioners. The Grand Jury can find no evidence of a crime in this transaction but that doesn't make it right.

GIVENS ROAD PROPERTY

Summary of the Transaction

The Grand Jury heard testimony and received evidence regarding this 33.198 parcel of land which adjoins Palm Creek Park in District 3 represented by Commissioner Mike Beaudreau. The Grand Jury learned that the property was placed under contract by Falcon Investments, LLC, a company owned by Marvin Hewatt and Larry Fleeman, in October of 2007. Once the property was placed under contract, Mr. Hewatt instructed his attorney Lee Tucker of Mahaffey, Pickens & Tucker to file a re-zoning application to change the zoning from RA-200 to R75 Modified. Both the Planning Commission and the Board of Commissioners voted to deny the application. Hewatt then instructed Tucker to file suit against the County.

During the pendency of the suit in preparation for litigation, the county law department commissioned an appraisal which valued the property at \$1,138,000.00.

During the pendency of the litigation Mr. Hewatt met with Chairman Charles Bannister in Bannister's office in the courthouse and had delivered his own appraisal which valued the property at \$2,423,000.00. This meeting occurred in February, 2009.

On May 5, 2009, the Board of Commissioners voted to approve the purchase of the property for \$2,290,662.00.

TESTIMONY OF WITNESSES

Mr. Marvin Hewatt testified that in addition to other business interests, he and his partner had made several land purchase investments. The business plan he described was that a parcel of land would be located, the property would be purchased, and the property would be re-zoned for high density residential purchases then sold on a per lot basis to a developer.

He testified that in 2007, Falcon Investments purchased approximately 33 acres of land located on Givens Road for forty-eight thousand five hundred dollars per acre. Once the

purchase was made, Mr. Hewatt instructed his attorney, Lee Tucker to file a re-zoning application to change the zoning from RA-200 (Residential/Agricultural) to RA-75 (High Density). The application was filed and eventually denied. Mr. Hewatt testified that during the pendency of the re-zoning application, he met with Commissioner Mike Beaudreau but was not encouraged by the commissioner's response to his application. His exact words were, "he didn't say what I wanted to hear."

After the denial, Mr. Hewatt authorized his attorney to file a lawsuit which was served on Gwinnett County on December 2, 2008. While the lawsuit was pending, Mr. Hewatt testified that he had received a phone call from his attorney instructing him to get an appraisal of the property because the county appraisal had valued the land at approximately thirty-four thousand dollars per acre. Based upon this conversation, Mr. Hewatt hired James Clower to appraise the property.

Mr. Hewatt testified that Mr. Clower appraised the property at approximately seventy-three thousand dollars per acre.

Mr. Hewatt testified that on February 24, 2009 he met Mr. Clower in the office of Chairman Charles Bannister and Mr. Clower delivered the appraisal directly to the Chairman. He then stated that he received a call from his attorney who told him that the county had made an offer of approximately sixty-eight thousand dollars per acre. Mr. Hewatt testified he was not happy with the offer but acting on advice of counsel he accepted it.

Mr. Hewatt described his relationship with Chairman Bannister as a friend and political supporter. He stated that he allowed Bannister to use a billboard for political advertising without charge and the use of a van for political purposes without a charge. The Grand Jury has been unable to locate these contributions on Mr. Bannister's disclosure filings. Mr. Larry Fleeman testified that the van was later purchased with Bannister campaign funds.

Mr. James Clower testified that he did an appraisal of the Givens Road property at the request of Lee Tucker on behalf of Tucker's client Falcon Investments. He stated that his opinion of value of the property was seventy-three thousand dollars per acre and that the highest and best use was for a RA-200 subdivision. He stated that his value per acre was based on the amount paid per acre for comparable tracts adjusted for an economic decline.

Mr. Clower then testified that he personally delivered his appraisal to Chairman Charles Bannister and Marvin Hewatt in the Chairman's office in the Justice and Administration Center. He stated that he believed it was on February 23, 2009. He remembered because Mr. Hewatt and Chairman Bannister pointed out an error in the appraisal where the appraisal was directed to Marvin Hewatt rather than Lee Tucker. He said he left, returned to his office, made the correction and returned to the chairman's office. When he returned, Mr. Hewatt was still in the office so he delivered the appraisal and left.

Commission Chairman Charles Bannister testified that he had known Marvin Hewatt for years and considered him a friend. Bannister said that Hewatt had sent him a plat of the Givens Road property expressing an

interest in selling the property to the County. Chairman Bannister testified that he had a recollection of the re-zoning application, its denial and the subsequent lawsuit. He was also aware of the County appraisal of the property. He stated he believed the County appraisal was too low based on prior County purchases. Chairman Bannister remembered becoming aware that the County had received an appraisal from a third party which valued the land at approximately seventy thousand dollars per acre but was unclear about where that appraisal originated.

Chairman Bannister on the 23rd of July, 2010 denied that he met with Marvin Hewatt in his office and denied that he received the appraisal from James Clower or Marvin Hewatt. On August 20, 2010, after the Grand Jury had subpoenaed his calendar, Mr. Bannister acknowledged that the meeting

may have taken place since it was on his calendar but again denied receiving the appraisal from Hewatt or Clower.

Chairman Bannister stated that he decided to "take the lead" on this particular purchase because of "so many no votes" coming from Commissioner Mike Beaudreau. He stated that getting this land transaction passed was to get Mr. Beaudreau's attention. To quote his testimony, "It was pure politics." He testified that this purchase was an object lesson to Commissioner Beaudreau.

Commissioner Kevin Kenerly testified that after the lawsuit was filed, he spoke to Marvin Hewatt's attorney who attempted to settle the lawsuit with the purchase of the land by the County. He said that he voted to deny the re-zoning request out of district courtesy. Mr. Kenerly testified that after the lawsuit was initiated he was in favor of the land acquisition because of his perception that the Law Department lost most re-zoning suits and the

zoning decisions of the Board of Commissioners were not upheld. He also stated that he believed that the County appraisal of the property was incorrect and not in line with previous purchases in the same area.

Kenerly testified that Chairman Bannister produced an appraisal at an Executive Session but that he didn't know where the appraisal came from. However, he stated that based on a lack of information from county staff, he believed that the sellers appraisal was a more accurate assessment of the value of the property. Kenerly stated he witnessed a heated discussion between Chairman Bannister and Commissioner Beaudreau and therefore he stated that he believed that Chairman Bannister was pushing the acquisition to "stick it to Mike". He stated that he disregarded district courtesy in his vote because Commissioner Beaudreau had benefitted from previous Board actions but then publicly criticized these actions. He cited the 2008 millage rate vote as an example.

Commissioner Bert Nasuti basically testified to the same facts and perceptions as Kenerly.

FINDINGS OF THE GRAND JURY

The Grand Jury could not find any evidence of any direct payment to any public official to induce any performance of an official duty. However, it is clear that in this land acquisition the regular process was subverted to benefit a long-time friend and political supporter of Charles Bannister. Just as disturbingly, over one million dollars of taxpayer money was used to make a political point. The Grand Jury believes that all of the district commissioners who voted in favor of the Givens Road property acquisition made choices that were financially unsound, motivated by petty politics and generally wrong for the citizens of Gwinnett County.

Furthermore, this particular acquisition is an example of what appears to be a complete disconnect between county staff and the current Board of Commissioners. Business decisions are being made without seeking input from staff, without staff volunteering information or without any real knowledge of the likelihood of success of any particular lawsuit.

The Grand Jury heard testimony in this case that the tract in question was not part of the Parks Master Plan nor did the park that adjoined the property need to be expanded. Despite that information the Board pursued acquiring the land.

The Grand Jury also heard testimony that the perception of Commissioners Kenerly, Nasuti and Beaudreau was that the lawyers for the County were unable to prevail in zoning lawsuits so settlement was their only option. The testimony from the Law Department was that the County prevails in most zoning lawsuits and in any event the result of a loss would be a remand for a new zoning decision not the payment of monetary damages.

This particular case, in the opinion of the Grand Jury, was not one which cried out for settlement unless the agenda was to allow the landowner to make a profit on the sale. If settlement was not mandated, the question of varying appraisals would never have come up. The only conclusion that can be reached is that the Board of Commissioners made a decision based on faulty information or perception or there was an agenda other than the best interests of the public at work in this case.

Based upon the contradiction between the testimony of Charles Bannister and Marvin Hewatt, the Grand Jury directed the District Attorney to prepare and present an indictment charging Charles Bannister with Perjury.

On October 8, 2010 Mr. Bannister asked the Grand Jury not to indict him and to allow him to resign effective immediately. After a consideration of the evidence in the case, the proposed charge, and in the interest of limiting costs to taxpayers and expediting a resolution of this matter, the Grand Jury decided that it was in the best interest of the citizens of Gwinnett County to allow Bannister to resign and for the Grand Jury to return a "No Bill" of Indictment. The Grand Jury in making this decision also considered the following factors:

- In our investigation which included a review of financial records, we did not uncover any evidence of an illegal payment or bribe in this transaction. The proposed charge was based upon contradictions in testimony before us, not upon the transaction itself.
- The Grand Jury weighed the possible outcomes. If we had returned an indictment then removal from office would have depended upon the outcome of the criminal trial. The Grand Jury decided that assured, permanent removal from office was the appropriate solution to one of the problems we uncovered in our investigation.

1-85 AT BEAVER RUIN

PROPERTY

Summary of Transaction

The Grand Jury heard testimony regarding these two parcels containing 36.79 acres (Tract A) and 21.12 acres (Tract B). In 2005 these two tracts were owned by Retail Development Partners, LLC, a company which is owned by Wayne Mason and others. In 2005, Retail Development applied for a re-zoning of Tract A from Commercial (C-2) to Multi-Family Residential (RZM). The Planning Commission voted to recommend approval of the re-zoning however, the Board of Commissioners upon motion of former Commissioner, Lorraine Green voted to deny the re-zoning. Retail Partners filed suit to challenge the denial.

During the litigation Tract A was appraised at a value of \$4,650,000.00. On February 15, 2007, the County purchased Tract A for \$4,650,000.00 and Mr. Mason donated Tract B which consisted of a stream and wetlands. The purpose of the purchase was for a public park and settlement of litigation.

TESTIMONY OF WITNESSES

Mr. Wayne Mason testified that he and other partners originally acquired a tract of land which he called the Rich's site in 1980 or 1981 and that the tract originally was made up of over one hundred acres. Actually, the Grand Jury learned that the tract contained one hundred thirty-three acres. He testified that after two or three years, he wanted to sell the property based on an offer but that his partners didn't want to sell so his partners bought him out for 5.7 million dollars.

Mr. Mason testified that he reacquired the entire piece of property back in "the 1990's" for 5.5 million dollars. He stated that one of the reasons he reacquired the tract was he needed stream buffer credits to develop another property at the now intersection of Pleasant Hill Road and North Berkley Lake Road. He also stated that since he knew the property was zoned for commercial development, he could use the property in his business.

Mr. Mason then testified that he sold part of the property which has frontage on Satellite Boulevard for commercial development and used his approved stream crossings to subdivide the remaining property. He stated that he applied for a zoning which would allow for the construction of apartments, was granted the re-zonings and sold each of the parcels for in excess of 5 million dollars. By 2007, the only parcel that had not been sold was the parcel in question in this inquiry and the property surrounding the

stream. This was a total of approximately 57 acres.

Mr. Mason told the Grand Jury that he received an offer to sell 30 acres for the purpose of building apartments contingent upon a re-zoning of the property. He applied for the re-zoning, received a positive recommendation from the Planning Commissioner but when the matter went to a vote before the Board of Commissioners, his application was denied. When the application was denied, Mr. Mason instructed his attorneys to file suit against Gwinnett County.

Mr. Mason testified that while the re-zoning process was ongoing he had no official conversations with any county commissioner but acknowledged that he may have spoken to one or more informally. After the filing of the lawsuit, Mr. Mason acknowledged that he spoke to Lorraine Green urging her to buy the property because he was confident he would win the lawsuit.

Significantly, Mr. Mason also testified that as early as 2001 the Gwinnett County Commission voted to condemn the entire 133 acres for green space acquisition. He testified that his understanding was that the condemnation effort was dropped because of problems with title to the property and because Commissioner Nasuti wanted an aquatic center on Peachtree Industrial Boulevard.

Mr. Mason finally agreed to settle the lawsuit for less than the contract price he had been offered and agreed to donate the wetlands (Tract B) to the County. He stated that he agreed to settle because when he considered the tax ramifications, the court costs and the value of the wetlands if he kept them, it made no business sense.

Lorraine Green, former District 1 Commissioner testified about her involvement in this transaction. She began by saying that from the outset she was opposed to Mason's re-zoning application. She stated that it was her belief that the last thing that Satellite Boulevard needed was more apartments. However, she testified that she was contacted by representatives of the neighborhoods adjoining the tract who were willing to negotiate with the re-zoning applicant if they could not stop the re-zoning. Mrs. Green testified that she remained opposed to additional apartments and so despite the recommendation of the Planning Commission, after consultations with the Law Department, she made the motion to deny the re-zoning. She said that, with the exception of Chairman Charles Bannister, it was not difficult to persuade the other commissioners to support her motion.

Mrs. Green testified that the idea to purchase the property for green space came from her. She testified that she was aware of the events of 2001 and believed the purchase was appropriate. She testified that although the litigation was only about Tract A, she insisted on the donation of Tract B as part of the settlement. Mrs. Green also testified that she asked for an engineering study to be done to assure herself that the proposed development by Mr. Mason was in fact feasible. Once this had been done, despite opposition from Bannister and some hesitancy from Nasuti, she made the motion to purchase the land to settle the lawsuit and as an acquisition of green space. The motion passed by a vote of 4 to 1.

Chairman Charles Bannister testified that his opposition to the land purchase began with the vote to deny the re-zoning application. He stated that he was opposed to the purchase of the property because of the development costs to the County. He also testified that he was opposed to the re-zoning application because he had made a campaign promise not to allow any more apartments. Chairman Bannister abstained from the vote to deny Mason's zoning application.

Mr. Bannister testified that after the filing of the lawsuit, he believes he inquired about the County's chances to prevail and was assured that zoning votes were rarely over turned. He then stated that when the subject of purchasing the land came up, he was

surprised because he had spoken to Community Services Director Phil Hoskins and had been informed about the high costs of developing the property. He stated based on his prior knowledge of the property and the other factors he mentioned he was opposed to the purchase of the property.

FINDINGS OF THE GRAND JURY

The Grand Jury finds no evidence of wrongdoing in the acquisition of this parcel of property. This is no evidence of any improper payment made to, or solicited by, Lorraine Green in her role as a public official.

In essence, this acquisition came down to a question of priorities. If Gwinnett County had won the lawsuit, Mr. Mason would have been left with a tract of land which was already zoned for commercial development. If the County had lost the lawsuit, apartments would have been built. This District Commissioner was faced with a difficult choice. Whether she made the correct choice depends on one's point of view. On one hand, green space and wetlands were preserved, while on the other hand, valuable property was removed from the tax digest.

RECOMMENDATIONS

OF THE GRAND JURY

The Special Purpose Grand Jury would like to thank District Attorney, Danny Porter, Stan Hall and the entire staff of the District Attorney's office for the professional and capable assistance they have provided this Grand Jury. We also want to express our appreciation to the court reporters Holly Brown and Tara Johnson. We also wish to commend the bailiffs Bob Hettesheimer and Mark Henderson for their professionalism and support as the bailiffs to the Special Purpose Grand Jury.

After the conclusion of ten months of testimony and evidence, the Special Purpose Grand Jury makes the following recommendations:

1. DISTRICT COURTESY

We understand that district commissioners work on a part-time basis for Gwinnett County in addition to their full-time employment. Therefore, due to the sheer volume of transactions and the amount of information involved in each transaction, commissioners often end up deferring to the commissioner of the district in which the transaction is proposed. This practice is known as district courtesy. It is the opinion of the Grand Jury that this concept of district courtesy, while useful in some ways, is at the root of the problems with each land transaction we examined. District courtesy has allowed commissioners to avoid responsibility and accountability for their votes. We heard on numerous occasions a commissioner testify that, unless there was something unusual about the transaction, they always voted with the district commissioner. This in effect allowed one commissioner to totally control a decision which affects all citizens of Gwinnett County. An example of this control is the Peachtree Industrial Boulevard property. The completely arbitrary and unexplained delay by Commissioner Kenerly in keeping the transaction from the agenda essentially ended up costing the taxpayers approximately four (4) million

dollars. No individual commissioner should have this kind of power.

The Grand Jury is strongly of the opinion that certain transactions such as parks transcend the concept of district courtesy. These are transactions which involve millions of dollars and affect all citizens of Gwinnett County. All commissioners should be involved and held responsible for all phases of

these types of projects.

II. REORGANIZATION OF COUNTY GOVERNMENT

The Grand Jury recommends that the basic structure of Gwinnett County government be changed. The current system with one full-time chairman and four part-time district commissioners does not provide adequate representation to the citizens of the County.

The current system with its reliance on district courtesy and its over-reliance on county staff provides too many opportunities for conflicts of interest and fosters a culture of inappropriate business relationships which have been the common thread running through our investigation.

The majority of the Grand Jury is in favor of making all current county commission seats, including the Chairman, a full-time position. Essential to this concept would be that these new commissioners would be adequately compensated and would be prevented from having any outside business interests which could potentially conflict with their responsibilities to govern. The expectation of these full-time commissioners would be that they would have the opportunity to be better informed and make better decisions. This system would also eliminate potential conflicts between their private life and

public responsibility.

In considering this recommendation, the Grand Jury recognized that it is unrealistic to expect the current part-time commissioners to be able to balance their private lives and occupations with the immense amount of

work needed to make intelligent decisions on county matters. Full-time commissioners, who would not be allowed to have outside employment, could devote the necessary time to each decision.

The Grand Jury also considered the cost of this system. Full-time commissioners would have to be adequately compensated to attract the type of candidate who could do the job. The Grand Jury recognizes that at first glance, this appears to be an additional cost to taxpayers. But, if just one of the land transactions we investigated could have been prevented by a wiser decision, that would more than pay for the salaries of full-time commissioners.

On the other hand, many members believe that moving to full-time commissioners may not be the answer. These members believe that the concept of a part-time Citizen/Commissioner is still valid. The members who support the idea of part-time commissioners do agree that the current system does not provide adequate representation and provides too many opportunities for misconduct. These members agree that the current workload is too burdensome and the current commission districts are too large for one person to adequately do the job on a part-time basis.

The alternate recommendation of the Special Purpose Grand Jury is to re-structure the current system to include more County Commissioners representing smaller districts. This would have multiple benefits to the citizens of the County.

- It would decrease the pervasive influence of district courtesy.
- It would reduce the workload on individual commissioners to allow and require them to make decisions based on all the facts.
- More districts would allow for better representation of each district.
- More districts would dilute the ability of one commissioner to totally control any given transaction.

Given these advantages and the Grand Jury's ultimate demand for more accountability, the proposal to add commissioners has significant merit.

III. BUSINESS PLAN

It is the opinion of the Grand Jury that the current business plan utilized by Gwinnett County government needs significant improvement. During the course of our investigation we observed serious pervasive lack of communication, information sharing, and even trust between the County Commissioners and the heads of the major departments of county government. On numerous occasions department heads testified

that they were not asked to offer an opinion about a particular land transaction. There was no inquiry by the Board of Commissioners about how the purchase would fit into the Parks Master Plan or the best use of the property was. Members of the staff, including the current and past County Administrator consistently testified that they were not asked and did not give an opinion whether a particular transaction was in the best interest of the citizens. One department head testified "that wasn't his job."

County Commissioners on the whole testified that department heads did not provide them with the information to make informed decisions. One current Commissioner described the staff as "note takers." It was clear from the testimony that the decisions are being made by commissioners based on a PowerPoint presentation made in Executive Session. Sometimes these sessions occur fifteen minutes before a vote is taken. Although the evidence shows that each commissioner is provided with a large packet of information, either because of time limitations or for other reasons, the packets are not being looked at.

The Grand Jury is of the opinion that there should be better communication between the County Staff and the Board of Commissioners. This communication should be clearly documented so that staff is clear on the intentions of the Board of Commissioners and the Board is clear about its intentions. Because of this lack of documentation, the Grand Jury was forced to dissect each transaction in order to determine the truth behind each purchase. The goal of the business process should be that every citizen should be able to examine any transaction conducted by Gwinnett County government and evaluate that transaction objectively. The county government should be able, and willing, to explain on each transaction who proposed it, who recommended it, why the Board voted for it, and why it benefitted the citizens. Citizens should expect no less and the Grand Jury finds that Gwinnett County government has failed to deliver on this expectation.

IV. LAND ACQUISITION

Commissioner Kenerly testified that he believed that the citizens of Gwinnett County had given him a mandate to acquire land to build parks and preserve green space. The Grand Jury does not disagree but we found a process that is ruled more by custom and by the whims of individual commissioners than it is by sound business decisions and economic considerations. The Grand Jury believes that the entire land acquisition process should be restructured to increase efficiency and, most importantly, accountability.

- First and foremost the acquisition should be based upon a philosophy of obtaining best value for the taxpayer's dollar. Instead of the current philosophy of buy it and make it work, each transaction should be critically examined to determine its current or future use and value. The presumption should be that unless a transaction can be justified under stringent standards known to all involved, the Gwinnett County Board of Commissioners should decline the purchase.
- Decisions to purchase land are important to all citizens and should transcend all notions of district courtesy. All information on all land transactions along with staff recommendations should be given to all County Commissioners as soon as the transaction is ready to be considered. No single commissioner should have the power to singlehandedly delay consideration of a purchase for political or other reasons.
- No Limited Liability Company should be permitted to apply for a rezoning, acquire property from the county or sell property to the county without a full disclosure of the individual identities of the shareholders. The Grand Jury recognizes that an LLC is a legitimate type of company formed for a variety of legitimate reasons but it should not be a vehicle to conceal the identity of individuals who are doing business with the government.
- The Grand Jury found that the minutes of Executive Sessions as they now exist are not useful to determine what actually happened in the meetings. They are cursory at best and only reflect the final action taken. The Grand Jury recommends that Executive

Sessions be audiotaped or videotaped to insure that later review will reveal what actually happened in the meetings.

- As stated earlier, the concept of consensus in Executive Session leaves all parties involved confused and unsure about the decision that was actually made. The Grand Jury recognizes that this procedure was instituted to ensure that all votes were made at public meetings. The Grand Jury also recognizes there are many topics, such as land pricing and negotiation strategy that should not be discussed at a public meeting. The current process should be re-evaluated since it clearly is not working.
- The Grand Jury became concerned about the apparent difference of opinion between commissioners and staff about the appraisal process and results. It appears that staff trusts the process and results implicitly while the current Board of Commissioners does not trust it at all. Provisions should be made and procedures put in place for those situations in which the seller's appraisal and the County appraisal vary. The decisions made by the Board of Commissioners, especially in settlement of litigation, must be made based on appraisals that the Board trusts and which are legally defensible.
- The Grand Jury found a profound lack of communication between the County Law Department and the members of the Board of Commissioners. The attorneys from the Law Department who testified told us that the county prevailed in the majority of cases in which a rezoning decision had been made. Several members of the Board of Commissioners testified that most of those cases were remanded for a different decision. In other words, the county lost the case. When pressed for specifics, neither the County Attorneys nor the

Commissioners could provide the Grand Jury with detailed information. It would seem that one of the fundamental pieces of information needed by the Board of Commissioners in deciding whether to settle a lawsuit would be an evaluation of the likelihood of success, including success in past cases. Members of the current Board testified that they were not provided this information. The County Attorneys testified that the Board was provided the information. Without the documentation procedures

mentioned earlier, the Grand Jury is unable to determine what happened. The Grand Jury is of the opinion that this type of information is critical to making informed decisions. The Grand Jury recommends that Gwinnett County government take whatever steps are necessary to restore confidence in the Law Department and to make sure that information is available to make sound decisions.

- The practice of offering appraisal price plus ten percent for land acquisition should be abolished. County government should have trained

real estate negotiators on staff to obtain the best value for taxpayer dollars. These negotiators should be experienced, aware of market conditions and have sufficient authority to conduct aggressive negotiations on behalf of taxpayers without undue influences from outside forces.

- The Grand Jury has found that SPLOST funds have been used for a variety of purposes from land acquisitions outside the Parks Master Plan to settlement of litigation. The Grand Jury is of the opinion that these actions have placed the passage of future SPLOST votes in jeopardy. SPLOST funds should be used for clearly delineated purposes approved by the voters, not as a general pot of money to be used for various purposes based upon a commissioner's desire.

- Finally, land acquisition should follow a clearly defined and set system of policies and procedures. These procedures should be public and designed to make the property acquisition decision as objective as possible and based upon a valid business reason. Deviation from these procedures should be the exception rather than the norm and each deviation should be adequately documented.

V. ETHICS REFORM

The Grand Jury was surprised to learn that the ethics ordinance passed by the Gwinnett County Board of Commissioners has not been significantly reviewed or changed since its passage in 1993. This is simply unacceptable. The Grand Jury recommends that the

ethics ordinance be reviewed and updated as necessary every two years. This should be a priority of the elected Board of Commissioners.

The Grand Jury has heard sufficient testimony to conclude that comprehensive enforceable ethics ordinance should be a priority for Gwinnett County Government. The only way that any semblance of trust can be re-established is for citizens to believe that their elected officials and county employees are acting ethically and on their behalf. The basics of

such an ethics ordinance would have to include full disclosure of business interests and prohibitions against receiving gifts or other things of value. Without these basics, trust cannot exist.

CONCLUSION

Based upon the evidence gathered during the course of our investigation, the Grand Jury, as a group of citizens, has been increasingly concerned about the path that Gwinnett County government is on. We have seen decisions involving millions of dollars made with little or no information or for the most venal reasons.

As interested citizens we have carefully considered our decisions and recommendations. It is now up to the elected leaders of Gwinnett County to carefully consider these recommendations and implement those they believe would best serve the public interest.

In many ways, Gwinnett County is still a great place to live, work and raise our children but in order to remain great, changes must be made.

In addition to the publication of presentments, we recommend that a copy of these presentments be delivered to:

Mr. Charles Bannister, Former Chairman, Gwinnett County Board of Commissioners

Ms. Shirley Lasseter, Gwinnett County Board of Commissioners

Mr. Bert Nasuti, Gwinnett County Board of Commissioners

Mr. Mike Beaudreau, Gwinnett County Board of Commissioners

Mr. Kevin Kenerly, Gwinnett County Board of Commissioners

Mr. Daniel J. Porter, Gwinnett County District Attorney

Honorable Dawson Jackson, Chief Superior Court Judge, Gwinnett Judicial Circuit

Honorable Michael C. Clark, Superior Court Judge, Gwinnett Judicial Circuit

Honorable William M. Ray, II, Superior Court Judge, Gwinnett Judicial Circuit

Honorable Karen E. Beyers, Superior Court Judge, Gwinnett Judicial Circuit

Honorable Ronnie K. Batchelor, Superior Court Judge, Gwinnett Judicial Circuit

Honorable Melodie Snell Conner, Superior Court Judge, Gwinnett Judicial Circuit

Honorable Debra K. Turner, Superior Court Judge, Gwinnett Judicial Circuit

Honorable R. Timothy Hamil, Superior Court Judge, Gwinnett Judicial Circuit

Honorable Tom Davis, Superior Court Judge, Gwinnett Judicial Circuit

Honorable Warren Davis, Superior Court Judge, Gwinnett Judicial Circuit

Karen Thomas, County Attorney

Steve North, Department of Support Services

Phil Hoskins, Department of Community Services

Lynn Smarr, Department of Water Resources

Brian Allen, Department of Transportation

Glenn Stephens, County Administration

Done this 22nd day of October, 2010.

By the Grand Jury

-s- MAYDEL MASSELLI-MONTERO, FOREPERSON

-s- JANICE N. MCCLOSKEY, CLERK

ORDER

The within and foregoing Report and Presentments of the Special Purpose Grand Jury, having been presented, it is ordered that the same be filed with the Clerk of this Court and spread upon the minutes thereof.

It is ordered that the Report and Presentment of the Special Purpose Grand Jury be published in the Official County news media, The Gwinnett Daily Post, as a legal notice, at least one time with costs to be paid from the general funds of Gwinnett County.

This 22nd day of October, 2010.

-s- Michael C. Clark

HONORABLE

MICHAEL C. CLARK

SUPERVISING JUDGE

GWINNETI COUNTY

SUPERIOR COURT

GWINNETI JUDICIAL

CIRCUIT

912-06615189,11/4@

|

|